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## APPENDIX A

## UNITED STATES COURT OF APPEALS
## ELEVENTH CIRCUIT

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No. 94-6650

STEPHEN J. MOREWITZ, as Administrator of the Estates of CHRISOS PASSALIS; CONSTANTINOS STAMATIS; GERASSIMOS MARKATOS; GEORGE MARANGOS; JESUS RAMOS MAYORQUIN; EFRAN ALVARADO MARTINEZ; and MUKHTAR AHMED, deceased,

*Plaintiffs-Appellants,*

v.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG),

*Defendant-Appellee.*

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Appeal from the United States District Court
for the Southern District of Alabama

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Sept. 6, 1[illegible]

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Before CARNES and BARKETT, Circuit Judges, and FLOYD R. GIBSON *, Senior Circuit Judge.

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

FLOYD R. GIBSON, Senior Circuit Judge:

Stephen Morewitz,[1] as administrator for the estates of several of the crew members who were aboard the M/V IMBROS when it disappeared at sea, brought wrongful death actions against the vessel's owner and managing agent in the United States District Court for the Eastern District of Virginia. After obtaining a favorable judgment, Morewitz brought this action in the United States District Court for the Southern District of Alabama, seeking to enforce the judgment and recover on a maritime protection and indemnity policy issued by West of England Ship Owners Mutual Protection and Indemnity Association ("West of England").

The district court dismissed Morewitz's lawsuit for lack of subject matter jurisdiction, concluding that this action was not based on a marine insurance contract, but rather, on English bankruptcy statutes. We reversed and held that this case fell within the federal court's admiralty and maritime jurisdiction pursuant to 28 U.S.C. § 1333.[2] *Morewitz v. The West of Eng. Ship Owners Mut. Protection and Indemnity Ass'n (Lux.)*, 896 F.2d 495, 496 (11th Cir.1990) ("*Morewitz I*").

On remand, the district court granted West of England's motion to stay the proceedings pending arbitration. Morewitz appealed, and we dismissed for lack of jurisdiction because the district court's order was interlocutory and not subject to appeal. *Morewitz v. The West of Eng. Ship Owners Mut. Protection and Indemnity Ass'n (Lux.)*, 5 F.3d 1498 (11th Cir.1993) (unpublished) ("*Morewitz II*").

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[1] Stephen Morewitz succeeded Ruth Morewitz as the administrator for these estates.

[2] "The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1) (1988).

On remand again, Morewitz argued that the deceased crew members were not bound by the arbitration agreement and, alternatively, the West of England had waived its right to compel arbitration. Unpersuaded by Morewitz's arguments, the district court ordered that the parties had six months in which to demonstrate that they were proceeding with arbitration. Morewitz requested that the district court reconsider its stay order or certify the question for immediate appeal. The district court denied both of these motions. As a result of Morewitz's continued refusal to comply with the arbitration order, the district court dismissed this case with prejudice for want of prosecution.

Upon Morewitz's third appeal to this Court, the issues before us are whether the district court erred in ordering arbitration, and, if so, whether it was an abuse of discretion to dismiss Morewitz's case with prejudice for failure to comply with the arbitration order. Because we conclude that the district court erred in compelling arbitration, we VACATE the district court's order dismissing this action and REMAND for further proceedings consistent with this opinion.

## I. BACKGROUND

### A. Facts

On December 13, 1975, the M/V IMBROS loaded with cargo in Mobile, Alabama, and departed for Quebec, Canada. Three days into its voyage, the crew notified the vessel's managing agent about leakage in the salt water cooling system for the main engine gears. On December 18, the crew broadcast an SOS or "Mayday message" from international waters in the region known as the Bermuda Triangle. The M/V IMBROS disappeared at sea, and no trace of the ship, its cargo, or its eighteen crew members was ever found.

The M/V IMBROS was registered to Imbros Shipping Company, Limited, ("Imbros Shipping") and managed by

General Development & Shipping Company, Limited, ("General Development"). Both Imbros Shipping and General Development were Cypriot corporations owned by George Tsourinakis and his wife. West of England had issued a maritime protection and indemnity policy covering the M/V IMBROS, which was in force and effect at the time of the vessel's disappearance.

As part of the risks insured against, the West of England policy provided compensation for the loss of life of any person on board an insured vessel. Furthermore, according to Rule 64 of the West of England Ship Owners Mutual Protection and Indemnity Association:

> If any difference or dispute shall arise between an insured Owner . . . and the Association out of or in connection with these Rules or arising out of any contract between an insured Owner and the Association or as to the rights or obligations of the Association or the insured Owner thereunder or in connection therewith or as to any other matter whatsoever, such difference or dispute shall be referred to the arbitration in London of a sole legal Arbitrator. . . . The obtaining of an Arbitration Award as hereinbefore provided shall be a condition precedent to the right of any insured Owner to bring or maintain any action, suit or other legal proceedings against the Association in respect of any such difference or dispute.

The record indicates that during 1976 and 1977, West of England paid settlements in Greece to the families of at least seven of the M/V IMBROS crew members. In addition, Morewitz alleged that West of England reimbursed General Development of the loss of vessel and cargo by giving the company credits against its unpaid premiums or "calls."

Between 1976 and 1978, Morewitz brought wrongful death actions on behalf of seven of the deceased crew

members against Imbros Shipping and General Development. The United States District Court for the Eastern District of Virginia dismissed Imbros Shipping for lack of personal jurisdiction, but determined that it had personal jurisdiction over General Development. West of England retained counsel to defend this action both before and after the district court dismissed Imbros Shipping from the litigation.

Morewitz then argued that General Development was an alter ego for Imbros Shipping and that General Development had procured the West of England policy and was responsible for the premiums. Morewitz also claimed that, according to George Tsourinakis' deposition testimony, General Development exercised all incidents of ownership over the M/V IMBROS, effectively making General Development a "demise charter party." [3]

In attempts to establish the party responsible for the M/V IMBROS at the time of its disappearance, Morewitz submitted interrogatories to General Development, but the company refused to respond. As a sanction for General Development's failure to comply with the district court's discovery order, the court found General Development to be the owner *pro hac vice* of the M/V IMBROS at the time of the loss.[4]

The district court then determined that the M/V IMBROS was inadequately staffed and unseaworthy when it

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[3] "To create a demise the owner of the vessel must completely and exclusively relinquish 'possession, command, and navigation' thereof to the demisee. . . . It is therefore tantamount to, though just short of, an outright transfer of ownership." *Guzman v. Pichirilo*, 369 U.S. 698, 699-700, 82 S.Ct. 1095, 1096, 8 L.Ed.2d 205 (1962) (citations omitted).

[4] "If a party . . . fails . . . to serve answers or objections to interrogatories . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just . . ." including an order preventing a disobedient party from opposing a designated claim. Fed.R.Civ.P. 37(b) and (d).

disappeared and that General Development was liable for the deaths of the vessel's crew members. On April 3, 1980, the district court entered judgment in favor of the decedents for a total of $459,456.36 in damages. General Development appealed, and the judgment was summarily affirmed by the Fourth Circuit Court of Appeals. *Morewitz v. General Dev. & Shipping Enters. Co., Ltd.*, 660 F.2d 491 (4th Cir.), *cert. denied*, 454 U.S. 939, 102 S.Ct. 474, 70 L.Ed.2d 246 (1981). At some point during the litigation in Virginia, General Development became insolvent and is now defunct. The judgment remains unpaid.

B. Procedural History

Morewitz registered the Virginia judgment in the United States District Court for the Southern District of Alabama.[5] On June 26, 1985, Morewitz filed the present lawsuit to enforce the judgment and recover proceeds under West of England's marine protection and indemnity policy that covered the M/V IMBROS at the time of its disappearance.

In the first incarnation of this litigation, Morewitz alleged that this suit was based on: (1) English bankruptcy statutes,[6] which created third party rights in favor of the decedents; and (2) a marine insurance contract, which fell within federal admiralty and maritime jurisdiction. West of England filed a motion to dismiss, arguing that the district court lacked subject matter jurisdiction.

Erroneously believing that it was constrained to characterize these proceedings either as a foreign bankruptcy or an admiralty action, the district court determined that

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[5] "A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner." 28 U.S.C. § 1963 (1988).

[6] For the text of The Third Parties (Rights Against Insurers) Act of 1930, see *Morewitz I*, 896 F.2d at 498 n. 3.

this suit was based on the English bankruptcy statutes. Consequently, the district court dismissed for lack of subject matter jurisdiction. *Morewitz I*, 896 F.2d at 498. This Court reversed, holding that "the subject matter of the suit is liability under a marine insurance policy, so the basis of [Morewitz's] case also is admiralty subject matter." *Id.* at 500.

On remand, Morewitz abandoned his argument that the English bankruptcy statutes applied, and instead, relied solely on the Alabama direct action statutes. Ala.Code §§ 27-23-1 and 27-23-2 (1975). As we stated in *Morewitz I*, direct action statutes "give a group of persons—those whose possible injury was the risk insured by the contract—direct standing to sue an insurer by putting them 'in the shoes' of the assured." 896 F.2d at 499.

On October 17, 1990, West of England filed a motion to stay the proceedings pending arbitration,[7] and on January 31, 1991, the district court granted West of England's motion. Morewitz then filed a motion for reconsideration and argued that West of England had waived any right that it may have had to compel arbitration. The district court denied Morewitz's motion, concluding that West of England was not in default for failing to make a pre-litigation demand for arbitration. After Morewitz's unsuccessful attempt to appeal the district court's order and his continued refusal to arbitrate, the district court dismissed this case with prejudice for want of prosecution. Morewitz appeals.

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[7] 9 U.S.C. § 3 (1988) provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

## II. DISCUSSION

### A. Jurisdiction

As a threshold matter, we address West of England's argument that this Court lacks jurisdiction to consider this appeal. Citing our decision in *Morewitz II*, West of England argues that "an appeal may not be taken from an interlocutory order . . . granting a stay of any action under section 3 of this title." 9 U.S.C. § 16(b)(1) (Supp. III 1991).

Pursuant to 28 U.S.C. § 1291 (1988), "[t]he court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." Decisions of the district court are final if they "end the litigation on the merits and leave nothing for the district court to do but execute the judgment." *Thomson McKinnon Sec., Inc. v. Salter*, 873 F.2d 1397, 1399 (11th Cir.1989) (quotation omitted). "A dismissal with prejudice clearly is a decision that ends the litigation on the merits and leaves nothing for the court to do but execute a judgment." *Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 673 (5th Cir. Unit B 1982) (quotations omitted).[8] We conclude that we have jurisdiction to hear this appeal.

Furthermore, we are guided by our decision in a case that was presented in the same procedural posture as the case at hand. State Establishment, the owner of the cargo that was destroyed during shipping, instituted a lawsuit against the vessel, the various corporations that managed the vessel and cargo, and the defendants' liability underwriter. *State Establishment for Agric. Prod. Trading v. M/V Wesermunde*, 838 F.2d 1576 (11th Cir.), *cert. denied*, 488 U.S. 916, 109 S.Ct. 273, 102 L.Ed.2d 262 (1988).[9] Upon the defendants' motion to have the dis-

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[8] Former Fifth Circuit case, Public Law 96-452 § 9(1)—October 14, 1980.

[9] The Supreme Court recently resolved a conflict between the Circuit Courts and held that foreign arbitration clauses in bills

pute referred to arbitration, the district court stayed the proceedings. *Id.* at 1579. State Establishment refused to arbitrate, and the district court dismissed the case with prejudice for failure to comply with the arbitration order. *Id.* at 1577.

Although we acknowledged the antiquated but viable admiralty law doctrine that there is no jurisdiction to hear an appeal from a district court's stay of admiralty proceedings pending arbitration, *Schoenamsgruber v. Hamburg Am. Line*, 294 U.S. 454, 457-58, 55 S.Ct. 475, 476-77, 79 L.Ed. 989 (1935), we concluded this predicament created a "Catch 22." *State Establishment*, 838 F.2d at 1579. State Establishment was being forced to expend substantial time, effort, and funds to comply with what was likely an erroneous arbitration order; yet, because of the *Schoenamsgruber* doctrine,[10] it was necessary to complete the arbitration process before the validity of the arbitration proceeding could be tested on appeal.

Faced with this dilemma, State Establishment, like Morewitz, believed that is was better to forego any damages it might potentially recover from the arbitration process in exchange for appealing the chance that the district court erred in ordering arbitration. *Id.* We noted, "[t]he inherent risk in taking such a position was, of course, that if the district court was correct in ordering arbitration, the dismissal with prejudice for failure to comply with that order would be affirmed by this court." *Id.* Fortunately for Morewitz, he has avoided this "inherent risk" because we disagree with the district court's order requiring the parties to arbitrate this dispute.

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of lading are not invalid under the Carriage of Goods by Sea Act. *Vimar Seguros Y Reaseguros, S.A., v. M/V SKY REEFER*, —— U.S. ——, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995).

[10] *See Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co.*, 761 F.2d 198, 202-03 (11th Cir.1985) (discussing the origins of the *Schoenamsgruber* doctrine).

B. Direct Actions

1. *English Law*

On appeal, Morewitz concedes that attempting to arbitrate this dispute in England would be futile. In 1990, the House of Lords held that when the terms of an insurance policy require the insured to pay its obligation before it may collect against the insurer, the insured must pay before any other party can sue on the contract.[11] *Firma C-Trade S.A. v. Newcastle Protection and Indem. Ass'n*, 2 Lloyd's Rep. 191 (H.L. 1990). "Because under English law, such payment is a 'condition precedent' to a direct suit against the insurer, plaintiffs cannot proceed under English law." *Psarianos v. Standard Marine Ltd.*, 12 F.3d 461, 464 (5th Cir.) (footnote omitted), *cert. denied*, —— U.S. ——, 114 S.Ct. 2164, 128 L.Ed.2d 887 (1994).

2. *Alabama Statutes*

As we have noted, however, Morewitz is not seeking recourse under the English bankruptcy law, but rather, under the Alabama direct action statutes.[12] The Alabama

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[11] According to Rule 18 of the West of England Ship Owners Mutual Protection and Indemnity Association, "it shall be a condition precedent of an insured Owner's right to recover from the funds of the Association in respect of any liabilities, costs or expenses that he shall first have discharged or paid the same."

[12] Ala.Code §§ 27-23-1 and 27-23-2 (1975) provide:

> As to every contract of insurance made between an insurer and any insured by which such insured is insured against loss or damage on account of . . . death by accident of any person for which loss or damage such insured is responsible, whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurer shall become absolute and the payment of the loss shall not depend upon the satisfaction by the insured of a final judgment against him for loss, or damage or death occasioned by the casualty. . . .
>
> Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators

direct action statutes state that recovery "shall not depend upon the satisfaction by the insured of a final judgment against him for loss." Ala.Code § 27-23-1.

3. *The Conflict*

Federal admiralty law neither authorizes nor forecloses a third party's right to directly sue an insurance company. *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485, 1487 (11th Cir.1986), *modifying* 747 F.2d 689 (1984). "A state may, however, create a direct action against a maritime insurer, at least where the state action is not in conflict with any feature of substantive admiralty law or any remedy peculiar to admiralty jurisdiction." *Steelmet*, 779 F.2d at 1487; *see Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 320-21, 75 S.Ct. 368, 374, 99 L.Ed. 337 (1955) (in the absence of a controlling federal admiralty principle, state law can be applied in an admiralty case). The conflict in the present case lies not with federal admiralty law, but with whether the English bankruptcy statutes or the Alabama direct action statutes apply.

We recognize that characterizing direct action statutes as either procedural or substantive is problematic, particularly in the context of admiralty jurisdiction.[13] *See*

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or executors, for loss or damage on account of bodily injury, or death . . . if the defendant in such action was insured against the loss . . . at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money provided for in the contract of insurance between the insurer and the defendant applied to the satisfaction of the judgment, and . . . the judgment creditor may proceed against the defendant and the insurer to reach and apply the insurance money to the satisfaction of the judgment.

[13] The Restatement (Second) of Conflict of Laws § 122 cmt. b (1971), suggests that rather than classifying issues as "procedural" or "substantive," courts should directly face whether the forum's rule should be applied. *See Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir.1991) (noting that federal common law follows the approach of the Restatement (Second) of Conflict of Laws).

*State Trading Corp. of India v. Assuranceforeningen Skuld*, 921 F.2d 409, 414-15 (2d Cir. 1990). "However, in order to promote orderly administration of justice and the integrity of courts' local rules, some laws are deemed procedural and not subject to choice of law rules." *Id.* at 416; *see also* Restatement (Second) of Conflict of Laws § 122 cmt. a (1971) (discussing a state's right to apply its own procedural law). Therefore, "[b]efore engaging in choice of law analysis, we first address [the] argument that [Alabama's] direct action statute is procedural and therefore not subject to choice of law rules." *State Trading*, 921 F.2d at 414.

In *Morewitz I*, we described direct action statutes as "remedial in character, rather than substantive." 896 F.2d at 499 (quotations omitted); *see also id.* at 501 (Tjoflat, J., concurring) (distinguishing that rather than mandating a direct action provision in every insurance contract, the English bankruptcy statute itself provided the right of action). We also noted that:

> Although it seems clear that English law would govern in construing the existence and amount of defendant's liability under the marine insurance contract, it is not as clear when the suit is being brought in Alabama, that English procedural law would apply. The cases we have reviewed, although not addressing the choice of law issue directly, indicate that the forum state's law may be the applicable law for purposes of applying any direct action statute. *See e.g., Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954); *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485 (11th Cir. 1986), *modifying* 747 F.2d 689 (1984).

896 F.2d at 499 n. 5 (additional citations omitted).

Moreover, in *Macey v. Crum*, 249 Ala. 249, 30 So.2d 666 (1947), the Supreme Court of Alabama held that its direct action statute "merely enables the person suffering the initial damages, out of which grows the loss to

the insured, to acquire a lien against the loss and the right to damages or indemnity arising under the policy, and to enforce it in his own name." *Id.* 30 So.2d at 668 (quotation omitted); *see also Fleming v. Pan American Fire & Cas. Co.* 495 F.2d 535, 539 (5th Cir. 1974)[14] (stating that Alabama's direct action statutes applied in a diversity case without regard to whether the insurance contract was made in Alabama or whether the named parties to the contract of insurance were residents or non-residents of Alabama); *but see State Trading*, 921 F.2d at 416 (concluding that the application of Connecticut's direct action statute would be inappropriate under the circumstances).

In summary, the Alabama direct action statutes mandate a direct action provision into every insurance contract and create a method of executing upon the proceeds of the insurance policy. Accordingly, we look to Alabama law in determining the manner in which this suit by Morewitz, the judgment creditor, against West of England, the judgment debtor's insurer, should proceed.

C. Arbitration

1. *Alabama Law*

" 'Under Alabama law, the injured party acquires a vested interest (secondary) in the nature of a hypothecation of the insured's rights under the policy.' " *Haston v. Transamerica Ins. Servs.*, No. 1930872, 1995 WL 217854, at *2, —— So.2d ——, —— (Ala. Apr. 14, 1995) (quoting *Maness v. Alabama Farm Bureau Mut. Casualty Ins. Co.*, 416 So.2d 979, 981-82 (Ala.1982)). The injured party, however, cannot bring an action against the insurer until he has recovered a judgment

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[14] Pursuant to *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir.1981) (en banc), decisions of the former Fifth Circuit entered prior to the split establishing the Eleventh Circuit are binding on the Eleventh Circuit.

against the insured. *Id.* Furthermore, the injured party's 'vested interest' is subject to the qualification that 'the terms of the policy imposing obligations on the insured are effective as against the injured party.' " *Id.* (quoting *George v. Employers' Liab. Assurance Corp.*, 219 Ala. 307, 122 So. 175, 177 (1929).) In other words, any defenses that are available to the insurer in an action brought by the insured would also be available to the insurer in a direct action brought by the injured party. *Id.*

Consequently, under Alabama law, West of England is able to assert any defenses that would have been available to it as if the present action had been brought by General Development. Arbitration is clearly an affirmative defense that would have been available to West of England in an action brought by General Development. *See American Sugar Refining Co. v. The Anaconda*, 138 F.2d 765, 767 (5th Cir.) (the Federal Arbitration Act recognizes arbitration agreements as affirmative defenses), *cert. granted*, 321 U.S. 758, 64 S.Ct. 620, 88 L.Ed. 1057 (1943), *aff'd*, 322 U.S. 42, 64 S.Ct. 863, 88 L.Ed. 1117 (1944). Therefore, unless the arbitration provision does not apply to these claimants or West of England has waived its right to compel arbitration, Morewitz is bound by the terms of the arbitration agreement between General Development and West of England.

2. *The Federal Arbitration Act*

As we have noted, a dispute arising under a contract of maritime insurance, such as the one involved here, is within the admiralty and maritime jurisdiction of the district court. The fact that Morewitz dervies his standing to proceed with this case from the Alabama direct action statutes does not vitiate that jurisdiction. *See Morewitz I*, 896 F.2d at 499-500 and n. 5.

The issue of arbitrability under the United States Arbitration Act is a matter of federal substantive law. *Prima*

*Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-05, 87 S.Ct. 1801, 1806-07, 18 L.Ed.2d 1270 (1967); *Miller Brewing Co. v. Fort Worth Distributing Co.*, 781 F.2d 494, 497 n. 4 (5th Cir.1986) (rejecting the appellee's citation to Texas law on the issue of whether it had waived the right to compel arbitration). Therefore, federal law comprising generally accepted principles of contract law controls the question of arbitrability.

According to the Federal Arbitration Act of 1952, 9 U.S.C. § 2 (1988), "[a] written provision in any maritime transaction . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction" is an enforceable arbitration agreement. Nevertheless, the Act does not require parties to arbitrate when they have not agreed to do so. "It simply requires courts to enforce privately negotiated agreements to aribtrate, like other contracts, in accordance with their terms." *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488 (1989). We have acknowledged that "[t]he purpose of the Federal Arbitration Act was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation." *Ultracashmere House Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir.1981).

3. *Application*

The arbitration agreement in Rule 64 of the West of England Ship Owners Mutual Protection and Indemnity Association applies between "owners" and the "association." Relying on the specific terms of this provision, Morewitz argues that the deceased crew members were not "owners." Morewitz also argues that the deceased crew members were not parties to the arbitration agreement and that they should not be bound by it. Notwithstanding our prior discussion that any defenses that would

have been available to West of England in an action brought by General Development would also be available to West of England in a direct action brought by the deceased crew members, the cases discussed below favor both of Morewitz's arguments.

First, in *Ocean Eagle—Limitations Proceedings,* 1974 AMC 1629 (D.P.R.), a tanker sank and spilled crude oil into the waters of San Juan Harbor. Numerous claimants brought direct actions suits against the vessel, the owners, and the insurance association. Upon the insurance association's motion for a stay pending arbitration in London, the court noted that "the injured third-party beneficiary of the contract is not a party to the contract . . . this is recognized by the limiting language of the arbitration clause which applies to a dispute between a 'member' and the 'association.'" *Id.* at 1633. Moreover, the court found that the right of action conferred by the Puerto Rico direct action statute was totally independent of the contractual terms binding the insured and the insurer, which the insurer could not abrogate by private agreement.

Second, in the case of *In re Talbott Big Foot, Inc.*, 887 F.2d 611 (5th Cir.1989), workers who were injured on a drilling barge filed claims against the drilling company's protection and indemnity insurer under Louisiana's direct action statute.[15] Based on the policy provision requiring the insurer and insured to arbitrate coverage disputes, the insurer filed a motion to stay the proceedings pending arbitration, and the district court dismissed the

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[15] Analogous to the Alabama direct action statutes, Louisiana's direct action statute provides that actions are subject to all of the lawful conditions of the policy or contract and the defenses that could be urged by the insurer in a direct action brought by the insured. *Talbott,* 887 F.2d at 612-13. However, unlike the Alabama statutes, the recovery of a judgment against the insured is not a condition precedent to the bringing of a direct action under Louisiana law. *Id.*

action. *Id.* at 612. On appeal, the Fifth Circuit recognized that despite a strong federal policy favoring arbitration, the Act does not require arbitration unless the parties to a dispute have agreed to refer it to arbitration. *Id.* at 614. As the Fifth Circuit aptly stated, "[w]e are unaware of any federal policy that favors arbitration for parties who have not contractually bound themselves to arbitrate their disputes." *Id.*

Although we recognize that Morewitz now "stands in the shoes" of General Development, we are reluctant to mandate arbitration where the claimants clearly did not bargain to do so. *Cf. AT & T Technologies v. Communications Workers of Am.*, 475 U.S. 643, 648-49, 106 S.Ct. 1415, 1418-19, 89 L.Ed.2d 648 (1986) (stating that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. . . . [A]rbitrators derive their authority to resolve disputes only because *the parties have agreed in advance* to submit such grievances to arbitration.") (emphasis added and quotation omitted)); *Wheat, First Securities, Inc. v. Green*, 993 F.2d 814, 821 (11th Cir.1993) (affirming the district court's holding that a securities broker-dealer that purchased another company's assets was not an assignee of or successor to the customer agreements that contained an arbitration provision); *Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418, 1419 (11th Cir.1990) (stating that despite a presumption in favor of arbitration, the parties will not be required to arbitrate when they have not agreed to do so).

In light of the cases discussed above, we question whether the arbitration clause in the policy between West of England and General Development applies to the deceased crew members. Moreover, even assuming that the arbitration clause applies, we conclude that West of England has waived any right that it may have had to compel arbitration.

4. *Waiver*

Morewitz bases his waiver argument on West of England's participation in the litigation in the United States District Court for the Eastern District of Virginia. Although Morewitz concedes that West of England was not a party to the Virginia litigation, he argues that rather than challenging coverage when this litigation was commenced, West of England unsuccessfully defended General Development's liability. Essentially, Morewitz argues that West of England should be bound by its failure to arbitrate with General Development when this dispute arose.

Arbitration should not be compelled when the party who seeks to compel arbitration has waived that right.[16] In considering the issue of waiver, we are mindful of the Supreme Court's admonition that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983).

Nevertheless, the doctrine of waiver is not an empty shell. Waiver occurs when a party seeking arbitration substantially participates in litigation to a point inconsistent with an intent to arbitrate and this participation results in prejudice to the opposing party. *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1158 (5th Cir. 1986). Prejudice has been found in situations where the party seeking arbitration allows the opposing party to undergo the types of litigation expenses that arbitration was designed to alleviate. *E.C. Ernst, Inc. v. Manhattan Constr. Co.*, 559 F.2d 268, 269 (5th Cir.1977), *cert. denied*, 434 U.S. 1067, 98 S.Ct. 1246, 55 L.Ed.2d 769 (1978).

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[16] Although the Arbitration Act uses the term "default," 9 U.S.C. § 3, the case law on this subject employs the term "waiver." *See generally* 3 Fed.Proc., L.Ed. *Arbitration* § 4.24 (1981) ("the term 'default' has been construed as analogous in meaning to the common-law term 'waiver' ").

Applying these considerations to the facts in this case, it is apparent to this Court that West of England has waived its right to compel arbitration. During the Virginia litigation, there were disputes between West of England and General Development over the ownership of the M/V IMBROS and over General Development's failure to assist with its defense. West of England was apprised of the significant monetary claims that were being pursued against General Development both in the United States and abroad, but never made a demand to arbitrate its coverage of the M/V IMBROS. Although the court in *Tenneco Resins, Inc. v. Davy Intern., AG*, 770 F.2d 416, 419 (5th Cir.1985), noted that a party is not obligated to make a presuit demand for arbitration, we do not believe that an insurer should be permitted to collude with its insured to the detriment of the injured third-party.

In light of the strong federal policy favoring arbitration, we also must examine whether Morewitz has been prejudiced by West of England's delay in demanding arbitration. The House of Lords decision affecting Morewitz's right to arbitrate this dispute in England was not announced until nearly a decade after the Fourth Circuit affirmed General Development's liability for the crew members' deaths. *Firma C-Trade S.A. v. Newcastle Protection and Indem. Ass'n*, 2 Lloyd's Rep. 191 (H.L.1990). Moreover, Morewitz instituted the present lawsuit in 1985, five years before the decision from the House of Lords. We conclude that West of England had ample opportunity to demand arbitration well in advance of the decision that significantly changed the legal position of the parties to the prejudice of Morewitz.

In short, the appropriate time for West of England to contest coverage and demand arbitration with General Development was during the proceedings in the United States District Court for the Eastern District of Virginia. Because West of England has waived its right to arbitrate

with General Development, it has also waived its right to demand arbitration with Morewitz.

D. Dismissal with Prejudice

We review the district court's decision to dismiss a case for want of prosecution for abuse of discretion. *See State Establishment*, 838 F.2d at 1582. "The severe sanction of dismissal with prejudice, however, can be imposed only in the face of a clear record of delay or contumacious conduct by the plaintiff." *Id.* (quotation omitted). Dismissal with prejudice is a sanction of last resort that is to be utilized only in extreme situations. *Id.*

As in the *State Establishment* case, Morewitz made a conscious decision that an unsuccessful appeal would mean that the merits of this claim would never be reached. *Id.* at 1582-83 and n. 3. Morewitz requested that the district court certify the arbitration question to this Court prior to dismissing the action, and the district court denied this motion. In *State Establishment*, we found that the district court abused its discretion by dismissing a lawsuit with prejudice under the same circumstances. *Id.* Likewise, we conclude that the district court abused its discretion by dismissing this action with prejudice.[17]

III. CONCLUSION

Therefore, we REVERSE the decision of the district court requiring arbitration, VACATE the order dismissing Morewitz's action with prejudice, and REMAND the case to the district court for further proceedings.

CARNES, Circuit Judge, concurring:

I concur in the result and in all of the majority opinion except Part II.C.3, on pp. 1364-65. As to that particular part of the opinion, I join only the last sentence, which

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[17] In light of our decision, West of England's motion for double costs and attorney's fees is denied.

concludes that West of England waived any right it may have had to compel arbitration. Because of that waiver, there is no need to speculate as to whether the arbitration provision would have applied had there been no waiver; all such speculation is merely dicta, better left to the law reviews.

## APPENDIX B

[Filed Jun. 22, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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Civil Action No. 85-0855

STEPHEN J. MOREWITZ, as administrator of the Estates of CHRISOS PASSALIS; CONSTANTINOS STAMATIS; GERASSIMOS MARKATOS; GEORGE MARANGOS; JESUS RAMOS MAYORQUIN; EFRAN ALVARADO MARTINEZ and MUKHTAR AHMED, Deceased,

*Plaintiffs,*

VS.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG),

*Defendant.*

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ORDER

This order comes pursuant to opinions issued by this Court December 10, 1993 and April 12, 1994. In those orders the Court gave the parties until June 10, 1994 to show that the case was proceeding with arbitration or face dismissal. Previously the Court stayed the case pending arbitration.

In response to those orders, Plaintiff filed a motion for relief from the stay, arguing that Plaintiff is not bound by the arbitration agreement, that Defendant waived any right to arbitration, and that Alabama law should apply to collection of the judgment from a previous case. In the alternative, Plaintiff asked this Court to certify the

questions of arbitration and choice of law to the Eleventh Circuit Court of Appeals.

## FACTS & PROCEDURAL HISTORY

This case stems from the unexplained loss of the M/V IMBROS with all hands in 1975 near Bermuda. The 300 foot vesel was carrying almost 30,000 railroad ties from Mobile, Alabama to Port Cartier, Quebec, Canada. In a resulting suit in Virginia, the vessel's owner, Imbros Shipping was dismissed on jurisdictional grounds, while the ship's managing agent, General Development & Shipping Enterprises (GDSE) remained a defendant in the case. A judgment for $459,456.36 (interest at 8% per anum) plus costs was entered against GDSE in the U.S. District Court for the Eastern District of Virginia on April 3, 1980.

Plaintiff brought suit in 1985 in Mobile against GDSEs insurance carrier, West of England, to recover the judgment. West of England's motion to dismiss was granted by this Court on the grounds that the suit was not in admiralty, but based on British bankruptcy law. On appeal the Eleventh Circuit reversed, holding that the case fell under the court's federal admiralty jurisdiction. *Morewitz v. West of England,* 896 F.2d 495 (11th Cir. 1990).

West of England then argued before this Court that under the terms of the insurance contract, the case was subject to arbitration. In April of 1992 this Court agreed and stayed the case pending arbitration. Plaintiff's appeal of the stay pending arbitration was dismissed by the Eleventh Circuit for lack of jurisdiction. *Morewitz v. West of England,* No. 92-6432, (11th Cir. Sept. 28, 1993). The appeals court found that the stay was not a final order under the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and therefore was not appealable.

From there the case returned to this Court with the stay pending arbitration still in effect. By December of

1993, arbitration had not yet begun, and the Court gave the parties six months to show that they were proceeding with arbitration or be dismised.

That time having passed, and arbitration still not begun, the Court must dismiss the case for Plaintiff's failure to prosecute.

Plaintiff's arguments that he is not bound by the arbitration agreement and that Defendant waived its right to arbitration have already been addressed in prior orders. Because arbitration is still in effect, Plaintiff's contention that the Alabama law of judgments should apply is improper.

Finally Plaintiff's request that the Court certify the arbitration question to the court of appeals is not due to be granted. Under 28 U.S.C. § 1292(b) the district court may certify a controlling issue of law upon which there is substantial disagreement and the appeal of which will materially advance the litigation. The Court determines that there is no substantial disagreement on the legal question of arbitration. Furthermore, this dismissal gives Plaintiff the right to proceed with appeal and offer all arguments to the Eleventh Circuit. Therefore, the Court denies Plaintiff's request for certification of the issue.

For the reasons stated above, the above styled case is DISMISSED with prejudice.

DONE this the 22nd day of June, 1994.

/s/ Daniel H. Thomas
DANIEL H. THOMAS
Senior United States District Judge

[Filed Jun. 22, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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Civil Action No. 85-0855

STEPHEN J. MOREWITZ, as administrator of the Estates of CHRISOS PASSALIS CONSTANTINOS STAMATIS; GERASSIMOS MARKATOS; GEORGE MARANGOS; JESUS RAMOS MAYORQUIN; EFRAN ALVARADO MARTINEZ and MUKHTAR AHMED, Deceased

*Plaintiffs,*

VS.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG),

*Defendant.*

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JUDGMENT

Pursuant to an order entered this same day, the above styled case is dismised with prejudice and the clerk ordered to close the case.

DONE this the 22nd day of June, 1994.

/s/ Daniel H. Thomas
DANIEL H. THOMAS
Senior United States District Judge

[Judgment Entered on Docket June 27, 1994]

## APPENDIX C

[Filed Dec. 10, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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Civil Action No. 85-0855

STEPHEN J. MOREWITZ, as administrator of the Estates of CHRISOS PASSALIS; CONSTANTINOS STAMATIS; GERASSIMOS MARKATOS; GEORGE MARANGOS; JESUS RAMOS MAYORQUIN; EFRAN ALVARADO MARTINEZ and MUKHTAR AHMED, Deceased,

*Plaintiffs,*

VS.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION and INDEMNITY ASSOCIATION (LUXEMBOURG),

*Defendant.*

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ORDER

This order comes pursuant an opinion issued in the above styled case on September 28, 1993 by the United States Court of Appeals for the Eleventh Circuit (No. 92-6432).

In that opinion the Eleventh Circuit found that it lacked jurisdiction to hear an appeal of this Court's order staying the proceedings pending arbitration. Therefore this Court's order of April 13, 1992 stands. The parties have 180 days to show cause that they are proceeding with arbitration or be dismised.

DONE this the 10th day of December, 1993.

/s/ Daniel H. Thomas
DANIEL H. THOMAS
Senior United States District Judge

**APPENDIX D**

[Filed Sep. 28, 1993]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 92-6432

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D. C. Docket No. 95-0855-T-C

STEPHEN J. MOREWITZ, as Administrator of the Estates of CHRISOS PASSALIS; CONSTANTINOS STAMATIS; GERASSIMOS MARKATOS; GEORGE MARANGOS; JESUS RAMOS MAYORQUIN; EFRAN ALVARADO MARTINEZ and MUKHTAR AHMED, Deceased,

*Plaintiffs-Appellants,*

versus

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION and INDEMNITY ASSOCIATION (LUXEMBOURG),

*Defendant-Appellee.*

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Appeal from the United States District Court
for the Southern District of Alabama

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(September 28, 1993)

Before BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

This is an appeal from the district court's order granting Appellee The West of England Ship Owners Mutual Protection and Indemnity Association's motion to stay the proceedings pending arbitration.[1] The district court ruled that, because the suit falls within its admiralty jurisdiction, *see Morewitz v. West of England Ship Owners Mutual Protection & Indemnity Association*, 896 F.2d 495 (11th Cir. 1990), the Federal Arbitration Act (FAA) applies to this case. When Appellant Morewitz appealed, this court *sua sponte* raised the question of whether an order to stay proceedings pending arbitration is a final order subject to appeal, and thereby within this Court's jurisdiction. Upon consideration of the jurisdictional question, we hold that this Court has no jurisdiction because the district court's order is not final and not subject to appeal.

Section 16 of the FAA, enacted as part of the 1988 Judicial Improvements and Access to Justice Act, provides the right to appeal from "a final decision with respect to an arbitration that is subject to [the FAA]," 9 U.S.C. § 16(a)(3), but prohibits appeal "from an interlocutory order granting a stay of any action under section 3 of [the FAA]," *id.* § 16(b)(1). The district court's order granted a stay under § 3 of the FAA. By its clear terms, the statute defines an order filed under § 3 as an interlocutory order from which an appeal may not be taken. 9 U.S.C. § 16(b)(1); *see also Thomson McKinnon Sec., Inc. v. Salter*, 873 F.2d 1397, 1399 (11th Cir. 1989) (noting that district court decisions are final if they "end[] the litigation on the merits and leave[] nothing for the [district] court to do but execute the judgment") (quoting *Catlin v. U.S.*, 324 U.S. 229, 233 (1945)).

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[1] The Appellee's Motion to Strike "Appellants' Reply to Jurisdictional Question" is denied.

In addition, the arbitration order is a part of the overall action on the marine insurance contract. That is, the arbitration motion was not before the district court as an independent action brought solely to test whether the claim was subject to arbitration. Instead, it arose "in an ordinary action in a U.S. district court." 9 U.S.C.A. § 16, Practice Commentary at 253.

For the foregoing reasons, the district court's order staying the proceedings pending arbitration is not final and is not subject to appeal. Accordingly, this Court has no jurisdiction and the appeal is

DISMISSED.

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

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C.A. 85-0855-T

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STEPHEN J. MOREWITZ, as administrator, et al.,
*Plaintiffs,*

VS.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG),
*Defendant.*

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## ORDER

In 1975, the vesel IMBROS was lost in international waters while on a voyage from Mobile, Alabama to Canada. As a result of this incident, plaintiffs filed a wrongful death suit in 1976 in the Eastern District of Virginia. Plaintiffs named various defendants including the vessel's owner Imbros Shipping and General Development & Shipping Enterprises (GDSE), the managing agent of the IMBROS. The Virginia court subsequently dismissed Imbros Shipping on jurisdictional grounds. GDSE however, remained a defendant in the Virginia suit. As a result of GDSE failing to respond to various discovery requests, the Virginia court entered an order directing that GDSE be treated as the owner, *pro hac vice*, of the IMBROS. Judgment was later entered against GDSE in the Virginia suit.

West of England was never named as a defendant in the Virginia suit. West of England was simply the insurer of Imbros Shipping, the defendant that was previously dismissed. Also, West of England provided counsel to GDSE to defend the Virginia suit.

On June 26, 1985, plaintiffs filed this suit in the Southern District of Alabama to recover under the contract of insurance issued by West of England. This case was dismissed on June 28, 1988, the Court citing a lack of subject matter jurisdiction. Pursuant to an appeal filed by plaintiffs, the Eleventh Circuit found that this Court did have jurisdiction of the present action. *Morewitz v. West of England Ship Owners Mut.*, 896 F.2d 495, 496. As a result, on October 17, 1990, the defendant filed a motion to stay this cause pending arbitration.

On January 31, 1991, this Court granted defendant's motion to stay these proceedings. The plaintiffs filed a motion to reconsider on February 8, 1991, and a motion for leave to serve discovery on February 19, 1991. After considering these motions and defendant's objections, the Court granted the plaintiffs' motion for leave to serve discovery. Specifically, the Court gave plaintiffs 90 days to complete the discovery on the issue of whether the defendant waived the right to arbitration. Upon later motion by the plaintiffs, the Court granted an extra 60 days to further complete discovery.

This matter is now before the Court to definitively determine whether the defendant waived its right to arbitration. The Court heard oral argument on this issue, on April 1, 1992. After hearing oral argument and carefully considering the parties' briefs, the Court finds the defendant did not waive its right to demand arbitration.

Plaintiffs state that because West of England failed to demand arbitration before, during, or after the Virginia suit and then failed to make a demand before the filing of the instant suit, a waiver of the arbitration right occur-

red. The Court does not agree. The plaintiffs argue that the defendant should be treated as a named defendant in the Virginia suit. In essence, that because it provided counsel to GDSE in Virginia, West of England was the alter ego of GDSE and had to demand arbitration at that time. The problem with the plaintiffs' argument is the nature of the Virginia suit. That suit was a wrongful death action against the named defendants. This put no burden on West of England to interject itself into the Virginia action and initiate a demand for arbitration.

Based on the plaintiff's complaint and the Eleventh Circuit ruling, the suit now pending before this Court is based on a contract of marine insurance. Since the plaintiffs claim to be successors in interest to the original insured, the Court finds that the provisions and rules governing the insurance policy in this case, are binding on plaintiffs. The issue thus becomes whether defendant had a duty to make a pre-suit demand for arbitration. Based on relevant case law, the Court finds defendant was under no such duty.

Since this suit is based on a contract of marine insurance and it is within the Court's admiralty jurisdiction, the Federal Arbitration Act applies. This Act places no burden on the defendant to make a pre-suit demand for arbitration. 9 U.S.C. § 3. The Act states, ". . . the Court . . . shall on application of one of the parties stay the trial of such action until such arbitration has been had in accordance with the agreement. . . ." *Id.* Since the statute is silent on the issue, the Court must examine the relevant case law to answer the question.

Defendant correctly points to a Fifth Circuit case that indeed, answers the question. In *Tenneco Resins, Inc., v. Davey Intern., AG,* 770 F.2d 416, 419 (5th Cir. 1985), the court cited its own 1970 decision and stated, "it is not necessary that the party moving for a stay of proceedings have made a pre-suit demand for arbitration." The 1970

Fifth Circuit decision, binding on this Court, sufficiently addresses the necessity of a pre-suit demand.

The Court finds that defendants acted properly in making a demand for arbitration on October 17, 1990. No earlier demand was required since this Court dismissed this action and an appeal was filed with the Eleventh Circuit. Therefore, the Court must refer this matter to arbitration. *Dean Witter Reynolds, Inc., v. Byrd,* 470 U.S. 231 (1985). Defendant's motion to stay these proceedings pending arbitration is GRANTED.

DONE this 13th day of April, 1992.

-/s/ Daniel H. Thomas
DANIEL H. THOMAS
Senior United States District Judge

## APPENDIX F

## UNITED STATES COURT OF APPEALS
## ELEVENTH CIRCUIT

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No. 87-7497

STEPHEN J. MOREWITZ, as Administrator of the estates of CHRISTOS PASSALIS, CONSTANTINOS STAMATIS, GERASSIMOS MARKATOS, GEORG MARANGOS, JESUS RAMOS MAYORQUIN, EFRAN ALVARADO MARTINEZ, and MUKHTAR AHMED, Deceased,

*Plaintiff-Appellant,*

v.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG),

*Defendant-Appellee.*

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Appeal from the United States District Court
for the Southern District of Alabama

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March 13, 1990

Before TJOFLAT, Chief Judge, JOHNSON, Circuit Judge, and ESCHBACH *, Senior Circuit Judge.

ESCHBACH, Senior Circuit Judge:

Plaintiff-Appellant, Stephen J. Morewitz, administrator of the estates of several deceased seamen, filed this action in federal district court seeking to recover on a marine

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* The Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

protection and indemnity policy issued by the defendant-appellee, The West of England Ship Owners Mutual Protection and Indemnity Association ("West of England"), a Luxembourg corporation. The deceased seamen, all foreign nationals, were crew members of the M/V IMBROS which sank in international waters off Bermuda in December 1975, and which was covered at the time of its sinking by an insurance policy issued by West of England. West of England is a mutual insurance association engaged in the business of providing marine protection and indemnity insurance to owners and operators of vessels. The district court dismissed this action, without prejudice, for lack of subject matter jurisdiction. The court held that this was not a suit on a marine insurance contract, but rather an action based on a British bankruptcy statute. Plaintiff then filed a motion for reconsideration of the dismissal order, which the court denied.

From the denial of his motion for reconsideration and the court's dismissal of this action, the administrator now appeals. First, he argues that the court had subject matter jurisdiction of this action because this is a suit to execute a judgment rendered in the District Court for the Eastern District of Virginia, which he registered in the Southern District of Alabama under 28 U.S.C. § 1963. Second, appellant contends that the court had subject matter jurisdiction because this is a suit on a marine insurance contract, which falls under our federal admiralty jurisdiction. Finally, appellant asserts that the court erred in deciding a factual issue without hearing evidence on the merits. For the reasons stated below, we reverse the district court's dismissal of the action for lack of subject matter jurisdiction because we disagree with its determination that this is not a suit on a marine insurance contract.

I.

This action arises out of the sinking of the M/V IMBROS, with the death of all crew members, somewhere off Bermuda in December 1975. Carrying a cargo of rail-

road ties, the ship was en route from Mobile, Alabama to Port Cartier, Quebec, Canada. Morewitz, the appointed administrator of the estates of the deceased crewmen, brought a wrongful death action against the vessel owner of record, Imbros Shipping Company, Limited ("Imbros Shipping"), a Cypriot corporation, and against the vessel's managing agent, General Development & Shipping Enterprises Company, Limited ("General Development"), a Cypriot corporation, in the United States District Court for the Eastern District of Virginia. The court dismissed Imbros Shipping as a party to the suit prior to trial for lack of personal jurisdiction. The court, however, determined that it had personal jurisdiction over General Development. Since General Development had failed to respond to the court's discovery orders, the court, pursuant to Rule 37(d) of the Federal Rules of Civil Procedure, found it to be the owner *pro hac vice* of the ship at the time of the loss. The court then determined that General Development was liable for the deaths of the ship's crew members. On April 3, 1980, the court entered a judgment against General Development for damages in the amount of $459,456.36. General Development appealed, and the Fourth Circuit Court of Appeals affirmed the judgment. 660 F.2d 491 (4th Cir.1981). Subsequently, General Development became insolvent, and the judgment remains unpaid.

On June 26, 1985, plaintiff filed this suit in federal district court against West of England seeking both to recover proceeds under a marine insurance policy that West of England had issued and to enforce the judgment entered by the United States District Court for the Eastern District of Virginia which was registered in the Southern District of Alabama under 28 U.S.C. § 1963. In 1975, West of England had issued a marine protection and indemnity policy covering the M/V IMBROS. The policy was in full force and effect at the time of the vessel's sinking in December 1975.

On August 28, 1985, West of England filed a motion to dismiss on several grounds, including that the court lacked subject matter jurisdiction over plaintiff's complaint. The court denied this motion. Apparently, the defendant filed another motion to dismiss or orally revived its earlier motion because the court held a hearing on the motion to dismiss on February 21, 1986.[1] Shortly thereafter, Morewtiz registered a certified copy of the judgment entered by the United States District Court for the Eastern District of Virginia in the District Court for the Southern District of Alabama. In addition to filing a brief in opposition to defendant's motion to dismiss, on March 28, 1986, Morewitz filed an amended complaint.

In his amended complaint, Morewitz alleges that this is an action on a marine insurance contract, which falls under the federal admiralty and maritime jurisdiction pursuant to 28 U.S.C. § 1333. He further alleges that General Development procured the certificate of insurance from defendant to insure "against losses which might be sustained by reason of claims and judgments for personal injuries and death occurring aboard" the M/V IMBROS. Plaintiff's Amended Complaint, Rec. 25, at 4. The defendant then refiled its motion to dismiss, on April 3, 1986, arguing that the court lacked subject matter jurisdiction over the action.

On May 19, 1988, the district court held a hearing on defendant's motion to dismiss the action. Subsequently, on June 29, 1988, the court dismissed, without prejudice, this action pursuant to Federal Rule of Civil Procedure 12(b)(1). First, the court held that rather than being an action on a marine insurance contract, this suit is based

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[1] Neither the record nor the docket sheet contains any reference to the filing of a second motion to dismiss. Based on the memoranda submitted in support of it and the transcript from the district court's hearing on the issue, we presume that the grounds alleged in the second motion to dismiss were the same as those asserted in the first motion to dismiss.

on a British bankruptcy statute. Second, the court ruled that jurisdiction did not exist pursuant to 28 U.S.C. § 1963 because plaintiff is seeking to assert a new cause of action against an entity that was not a party to the action in the Virginia suit. Plaintiff then filed a motion for reconsideration of the court's order dismissing the action for lack of subject matter jurisdiction, which the court denied on July 7, 1988.

II.

Morewitz now appeals from the district court's dismissal of this action for lack of subject matter jurisdiction. He contends that the district court had subject matter jurisdiction over this dispute because this is a suit on a marine insurance policy which falls under our federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333.[2] He concedes that the deceased seamen were not named insureds under the insurance policy, but argues that this fact is irrelevant for purposes of determining subject matter jurisdiction. In rebuttal, West of England asserts that this fact is relevant. According to West of England the deceased seamen were neither parties to the insurance contract nor third party beneficiaries of it and, therefore, invocation of admiralty jurisdiction on the basis that the suit is one on a marine insurance contract is improper. The deceased seamen are allegedly suing under rights created by an English bankruptcy statute, The Third Parties (Rights Against Insurers) Act of 1930.[3] Thus, ar-

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[2] The statute, in relevant part, provides, "The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1).

[3] Section one of this Act provides:

1. Rights of third parties against insurers on bankruptcy, etc., of the insured

gues West of England, this case involves something other than admiralty.

In its order dismissing this action, the court concluded that the basis of the plaintiff's complaint was the English statute. The court noted that the plaintff alleged in his complaint that English law governs this dispute, and that he attached a copy of the text of the English statute to the complaint. The court quoted from a portion of the plaintiff's complaint in which he alleged that because a receiver had been appointed over General Development's assets in Cyprus, "its rights to indemnity under the said contract of insurance with the Defendant have become vested in the Plaintiff, who now has standing to sue the Defendant under the above-mentioned provisions of said statute." Plaintiff's Amended Complaint, Rec. 25, at 7. From this, the court concluded that "it is clear that the plaintiff's action is based on a British bankruptcy statute

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(1) Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then—

(a) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or

(b) in the case of the insured being a company, in the event of a winding-up order being made, or a resolution for a voluntary winding-up being passed, with respect to the company, or of a receiver or manager of the company's business or undertaking being duly appointed, or of possession being taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge;

if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred.

Plaintiff's Amended Complaint, Rec. 25, at 23.

which is not maritime in nature." District Court's Order, Rec. 35, at 5. Although the court did not detail its reasoning, it seems that it felt it was faced with an either/or decision—either this action concerns foreign bankruptcy or this action concerns admiralty—and made its decision in favor of bankruptcy.

The lower court erred in both the characterization and resolution of its decision. Morewitz alleges, in his amended complaint, that he is seeking to recover on a marine protection and indemnity policy which West of England issued on the M/V IMBROS. Plaintiff's Amended Complaint, Rec. 25, at 1, 4. This is enough to confer subject matter jurisdiction, for it is well settled that a suit on a contract of marine insurance falls within our federal admiralty jurisdiction. *Kossick v. United Fruit Co.*, 365 U.S. 731, 735, 81 S.Ct. 886, 890, 6 L.Ed.2d 56 (1961); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313, 75 S.Ct. 368, 370, 99 L.Ed.2d 337 (1955); *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 35-36, 20 L.Ed. 90 (1870). The English statute is of no import here; subject matter jurisdiction exists with or without it.

This is so because the English statute concerns standing to sue, not subject matter jurisdiction. The statute is not a "bankruptcy statute" but a common direct action statute. Direct action statutes generally have nothing to do with subject matter jurisdiction; they are " 'remedial in character, rather than substantive.' " *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230, 241 (5th Cir.1969), *denying petition for rhe'g and reh'g en banc of* 419 F.2d 230 (Brown, C.J., dissenting from denial of rehearing) (quoting *Finn v. Employers' Liability Assurance Corp.*, 141 So.2d 852, 864 (La.Ct.App.1962)). They do not create any liabilities or causes of action, they merely give a group of persons—those whose possible injury was the risk insured by the contract—direct standing to sue an insurer by putting them "in the shoes"

of the assured. *See id.; Tokio Marine & Fire Ins. Co. v. Aetna Casualty Co.*, 322 F.2d 113, 116-17 & n. 8 (5th Cir. 1963); *Degelos v. Fidelity & Casualty Co.*, 313 F.2d 809, 815 (5th Cir.1963). *See also Crown Zellerbach Corp. v. Ingram Indus., Inc.*, 783 F.2d 1296, 1299, 1301 (5th Cir.) (en banc) (overruling in the Fifth Circuit on grounds not relevant here *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230 (5th Cir.1969)), *cert. denied*, 417 U.S. 821, 107 S.Ct. 87, 93 L.Ed.2d 40 (1986). The insurer's liability remains the same (that which it had under the contract), only now it has to pay the injured persons, not the assured.[4] Here, the English statute gives direct action litigation rights to the plaintiff, but it does not change the subject matter—marine insurance—upon which his suit is based.

Because the standing question is separate and distinct from the subject matter question, there is no "either/or" decision to make. The plaintiff has standing to sue by virtue of the English statute,[5] so in one sense (the stand-

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[4] It does no good to argue that the insurer's liability is changed because under the terms of an insurance policy it is obligated to pay only after the assured has paid (an indemnity contract) whereas under the statute it must pay even though the assured has not. Such "no action" terms are generally voided by direct action statutes; it is as if they never existed. *Nebel Towing Co.*, 419 F.2d 238, 241 (Brown, C.J., dissenting denial of rehearing). This seems to be the result of the English statute. Such a result occurs because "[t]he direct action statute becomes a part of every insurance policy having effect [in the forum] as though written into the policy." *Nebel Towing Co.*, 419 F.2d 230, 237 (discussing the Louisiana direct action statute). *See also Nebel Towing Co.*, 419 F.2d 230, 241 (" 'No Action' clauses are ineffectual.") (Brown, C.J., dissenting). Because direct action statutes are "part" of the insurance policy, then liability under that policy is not changed by the statutes.

[5] We assume this to be the case for purposes of our subject matter jurisdiction discussion. Plaintiff alleged in his complaint that: "[p]ursuant to the published rules of the Defendant . . . which form a part of the [marine insurance contract], English

ing sense) the basis of his case is that statute. Yet the subject matter of the suit is liability under a marine insurance policy, so the basis of his case also is admiralty subject matter. *See e.g., Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954); *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485

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law governs any and all disputes between the Defendant and those claiming under or by virtue of contracts of insurance issued by the Defendant." Plaintiff's Amended Complaint, Rec. 25, at 6. He then took this to mean that the English direct action statute, as English law, was applicable. *Id.* at 7. The defendant concedes in its brief that "the contract identifies English law as the governing law," Defendant's Reply Brief at 12, and also that the English direct action statute is applicable. *Id.* at 17-19. Because both parties seem intent on letting the English statute apply, we deem it to apply for the purposes of this appeal.

But we are not so sure that an extended inquiry into choice of law rules would show that the English statute is applicable. Although it seems clear that English law would govern in construing the existence and amount of defendant's liability under the marine insurance contract, it is not as clear, when the suit is being brought in Alabama, that English procedural law would apply. The cases we have reviewed, although not addressing the choice of law issue directly, indicate that the forum state's law may be the applicable law for purposes of applying any direct action statute. *See e.g., Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954); *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485 (11th Cir.1986), *modifying* 747 F.2d 689 (1984); *Nebel Towing* 419 F.2d 230; *Aetna Casualty, supra; Fidelity & Casualty, supra; Ingram Indus., supra*, at 1301 (quoting *Burke v. Massachusetts Bonding & Ins. Co.*, 209 La. 495, 24 So.2d 875 (1946)). *See also Wilson Boat, supra* (discussing marine insurance in general); *Gulf Tampa Drydock Co. v. Great Atlantic Ins. Co.*, 757 F.2d 1172, 1174 (11th Cir.1985) (same).

Thus, the choice of law question could conceivably affect plaintiff's standing, and, consequently, the Court's Article III power to decide the case. *See* U.S. Const. art. III, § 2. We need not concern ourselves with it now, however, as plaintiff has also alleged that he has standing under Alabama law should it apply, *see* Plaintiff's Amended Complaint, Rec. 25, at 28 (referring to Ala.Code §§ 27-23-1 to -2), and as defendant has not seen fit to argue otherwise.

(11th Cir.1986), *modifying* 747 F.2d 689 (1984); *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230 (11th Cir.1969), *cert. denied*, 397 U.S. 989, 90 S.Ct. 1120, 25 L.Ed.2d 396 (1970); *Aetna Casualty, supra; Fidelity & Casualty, supra. See also Ingram Indus., supra.* As this is so, the district court erred in dismissing plaintiff's case for lack of subject matter jurisdiction.[6]

III.

For all the foregoing reasons, the district court's judgment is REVERSED and the case is REMANDED for further proceedings.

TJOFLAT, Chief Judge, concurring:

I concur in the result reached by the majority but write separately because I am concerned with its discussion of "standing to sue."

As a suit on a contract of marine insurance, this case falls within the federal courts' admiralty jurisdiction. *See Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 35-36, 20 L.Ed. 90 (1870). The district court improperly characterizes the role in this suit of a British bankruptcy stat-

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[6] This disposes of the question on subject matter jurisdiction. Thus, we need not and do not address Morewitz's argument that the district court had subject matter jurisdiction over his case due to 28 U.S.C. § 1963.

Morewitz also argues that the court erred in deciding a factual issue without hearing evidence on the merits. In a footnote in its order, the district court suggested that General Development may not be a named insured in the marine insurance policy covering the M/V IMBROS. But we need not and do not address this issue either. First, such a "finding" is of no consequence in relation to the procedural posture of the district court's order, which ruled on defendant's Fed.R.Civ.P. 12(b)(1) & (2) motion to dismiss. Second, the record before the Court is devoid of evidence regarding the issue. We simply could not resolve it on the record before us.

On remand, and after receiving more evidence, the lower court may try again.

ute that provides a third party with a direct action against an insurer when the insured has become insolvent. The district court correctly concludes that the plaintiff's cause of action here depends upon that statute: without it, the plaintiff could bring no direct action against the insurer. The district court, however, incorrectly concludes that the cause of action depends *solely* upon the statute. The action also depends upon the underlying contract of marine insurance: the British statute alone would give the plaintiff no cause of action. Because the suit is based in part on this insurance contract, it falls within the federal courts' admiralty jurisdiction.

The majority is confused about whether this statute provides a basis for the plaintiff's cause of action. The majority states that the statute "concerns standing to sue," but that such statutes "do not create any liabilities or causes of action." *Ante* at 499. A few sentences later, however, the majority concludes that "the English statute gives direct action litigation rights to the plaintiff." *Id.* The term "litigation rights" must surely mean a right, or cause, of action.

The majority's confusion seems to result from its attempt to analogize this British statute to a Louisiana direct action statute, La.Rev.Stat.Ann. § 22:655 (West 1988 & Supp.1989). The Louisiana statute mandates that every liability insurance contract issued in Louisiana contain a direct action provision for third parties against an insurer if an insured becomes insolvent. *See id.* If the British statute involved here operated in this manner, then the majority would be correct in asserting that the British statute creates no "liabilities or causes of action," *ante* at 499. The British Statute, however, operates differently. Rather than mandating a direct action provision in every insurance contract, the statute itself provides the right of action: the insured's "rights against the insurer under the contract in respect of the liability shall . . . be transferred to and vest in the third party to whom the liability was so

incurred." The Third Parties (Rights Against Insurers) Act, 1930, 20 & 21 Geo. 5, ch. 25, § 1(1). This statute thus "vests" a substantive right in the third party—a right that is, of course, equivalent to the insured's rights under the contract.

In short, the plaintiff's right of action in this case depends on both the insurance contract and the statute. This action (because it depends in part on the insurance contract) falls under federal admiralty jurisdiction; I therefore concur in the result reached by the majority.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 88-7497

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(D.C. Docket No. 85-0855-T)

STEPHEN J. MOREWITZ, as Administrator for the Estates of CHRISOS PASSALIS, CONSTANTINOS STAMATIS, GERASSIMOS MARKATOS, GEORGE MARANGOS, JESUS RAMOS MAYORQUIN, EFRAN ALVARADO MARTINEZ and MUKHTAR AHMED, Deceased,

*Plaintiff-Appellant,*

versus

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOC. (LUXEMBOURG),

*Defendant-Appellee.*

---

Appeal from the United States District Court
for the Southern District of Alabama

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Before TJOFLAT, Chief Judge, JOHNSON, Circuit Judge, and ESCHBACH*, Senior Circuit Judge.

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

## JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

TJOFLAT, Chief Judge, concurred and filed an opinion.

Entered: March 13, 1990
For the Court:

Miguel J. Cortez
Clerk

By: /s/ Karleen McNoll
Deputy Clerk

Issued as Mandate: May 18, 1990

[Filed May 9, 1990]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 88-7497

---

STEPHEN J. MOREWITZ, as Administrator for the Estates of CHRISOS PASSALIS, CONSTANTINOS STAMATIS, GERASSIMOS MARKATOS, GEORGE MARANGOS, JESUS RAMOS MAYORQUIN, EFRAN ALVARADO MARTINEZ and MUKHTAR AHMED, Deceased,

*Plaintiffs-Appellants,*

versus -

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOC. (LUXEMBOURG),

*Defendant-Appellee.*

---

Appeal from the United States District Court
for the
Southern District of Alabama

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC
(MAY 9, 1990)

Before TJOFLAT, Chief Judge, JOHNSON, Circuit Judge, and ESCHBACH*, Senior Circuit Judge

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

PER CURIAM:

(✔) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Tjoflat
United States Circuit Judge

## APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

---

Civil Action No. 85-0855-T

STEPHEN J. MOREWITZ,
*Plaintiff,*

VS.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG),
*Defendants.*

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### ORDER

This cause is before the Court on defendants' motion to dismiss brought pursuant to 12(b)(1)&(2) Fed.R.Civ. P. The defendant asserts that this Court lacks subject matter jurisdiction as well as personal jurisdiction. In the alternative, the defendant prays for dismissal under the doctrine of forum non conveniens. As the Court finds that it lacks subject matter jurisdiction, it will not address the issues of personal jurisdiction nor forum non conveniens.

### BACKGROUND

This action arises out of the sudden sinking of the SS IMBROS, and the consequential death of all crewmen, somewhere off Bermuda in December 1975. The vessel was carying a cargo of railroad ties from Mobile, Alabama, to Quebec, Canada.

Stephen Morewitz, the appointed administrator of the estates of the deceased crewmen, brought a wrongful death action against the vessel owner of record, Imbros Shipping Company, and General Development & Shipping Enterprises Co., Ltd. (GDSE) in the U. S. District Court for the Eastern District of Virginia. Imbros Shipping was dismissed prior to trial for lack of personal jurisdiction. However, the Court determined that it maintained personal jurisdiction over GDSE and, based upon the failure of GDSE to respond to its discovery orders, the Court found GDSE to be the owner *pro hac vice* of the IMBROS at the time of the loss.

Upon consideration of the evidence presented by the plaintiff, the district court in Virginia found that at the time of the casualty: (1) the IMBROS was unseaworthy; (2) the defendant GDSE had knowledge of such unseaworthiness; and therefore, (3) GDSE was liable for the deaths of the crewmen aboard the IMBROS. The Court entered a judgment against GDSE for damages in the wrongful death actions. Subsequent to the entry of judgment, GDSE became insolvent, and consequently, the judgment has remained unpaid.

The plaintiff, Morewitz, in his capacity as administrator of the estates of seven deceased crewmen, brings this action pursuant to 28 U.S.C. § 1963, asking this Court to enforce the judgment rendered against GDSE in the Eastern District of Virginia. Morewitz asserts that pursuant to the British Third Parties (Rights Against Insurers) Act of 1930, West of England, the insurer of the IMBROS is liable to pay the judgment rendered against GDSE since the Virginia Court deemed GDSE the owner *pro hac vice* of the IMBROS and further found GDSE liable for the wrongful death claim arising from the loss of the IMBROS.

## DEFENDANT'S MOTION TO DISMISS

The defendant aserts that this Court lacks subject matter jurisdiction. The burden of proof on a 12(b)(1) motion is on the party asserting jurisdiction. *Menchaco v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 358, 449 U.S. 953, 66 L.Ed.2d 217. Moreover, no presumptive truthfulness attaches to plaintiff's allegations and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of the jurisdictional claims. *Mortensen v. First Fed. Savings & Loan Ass'n.*, 549 F.2d 884 (3rd Cir. 1977).

The plaintiff, in his amended complaint, seeks to establish this Court's subject matter jurisdiction pursuant to 28 U.S.C. § 1333, by asserting that this is a suit on a contract of marine insurance. However, close analysis reveals that the foundation of the complaint is the British Statute, The Third Parties (Rights Against Insurers) Act, 1930. Said statute provides in pertinent part:

> 1. Rights of third parties against insurers on bankruptcy, etc. of the insured
>
> (1) Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then—
>
> (a) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or
>
> (b) in the case of the insured being a company, in the event of a winding-up order being made, or a resolution for a voluntary winding-up being passed, with respect to the company, or of a receiver or manager of the company's business or undertaking being duly appointed, or of possession being taken, by or on behalf

> of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge;
>
> if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred.

According to paragraph 13 of the plaintiff's complaint, the statute provides that in instances of bankruptcy, upon appointment of a receiver or manager for a business, a creditor of the business succeeds to the rights of the insured under an existing contract of insurance. Moreover, paragraph 14 provides:

> By reason of the appointment of said receiver and provisional liquidator of General Development & Shipping Co., Ltd., in Cyprus, its rights to indemnity under the said contract of insurance with the Defendant have become vested in the Plaintiff, *who now has standing to sue the Defendant under the above mentioned provisions of said statute.*
>
> (Emphasis added)

Though the plaintiff contends that this is an action on a marine insurance contract, it is clear that the plaintiff's action is based on a British bankruptcy statute which is not maritime in nature.[1]

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[1] It should be noted that if this Court determined that it had subject matter jurisdiction, and invoked Alabama's direct action statute (§ 27-23-2 Ala. Code 1975), as urged by the plaintiff, the action would be due to be dismissed as the remedy provided by § 27-23-2 can only be exercised after the injured party has recovered a judgment against the insured. See *MacMillan-Bloedel, Inc. v. Firemen's Insurance Company of Newark, New Jersey*, 558 F.Supp. 596 (S.D.Ala. 1983). The evidence herein reflects that

Alternatively, the plaintiff attempts to establish jurisdiction pursuant to 28 U.S.C. § 1963, praying that this Court enforce the judgment of the court in the Eastern District of Virginia.[2] However, such statute does not apply herein because the plaintiff is not seeking to enforce the judgment entered against GDSE in Virginia, but is asserting a new cause of action pursuant to a British statute, against an entity that was not a party to the action in the Eastern District of Virginia.

Based on the foregoing, this Court finds that this action is due to be, and hereby is DISMISSED pursuant to 12(b)(1) Fed.R.Civ.P. for lack of jurisdiction over the subject matter, without prejudice to any right the plaintiff might have to seek recovery elsewhere in a court of competent jurisdiction. Costs taxed against plaintiff.

DONE at Mobile, Alabama, this the 29th day of June 1988.

/s/ Daniel H. Thomas
United States District Judge

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Imbros Shipping Company was the only named insured in the policy of insurance covering the SS IMBROS. No judgment has been rendered against the insured.

[2] The plaintiff readily admits that the reason the action was filed in this Court rather than in the Eastern District of Virginia, is that Virginia's long-arm statute affords the plaintiff no relief; whereas, Alabama's long-arm statute is much broader than that of Virginia.

## APPENDIX H

[Filed Apr. 3, 1980]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

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Civil Action No. 76-103-NN, No. 77-63-NN,
No. 77-95-NN, No. 78-108-NN

STEPHEN J. MOREWITZ, ADMINISTRATOR, ETC., *et al.*,
*Plaintiffs*

v.

IMBROS SHIPPING CO., LTD., *et al.*,
*Defendants*

---

ORDER

In accord with a Memorandum Opinion this day filed and to which reference is hereby made:

(1) Judgment is entered for the defendant, General Development & Shipping Enterprises Co., Ltd., and against the plaintiff, Stephen J. Morewitz, Administrator of the Estates of Augustus Edoro, Afam Eseumi, and Moses Egbonim.

(2) Judgment is entered for the defendant, General Development & Shipping Enterprises Co., Ltd., and against the plaintiff, Stephen J. Morewitz, Administrator of the Estates of Sultan Akbar, Markos Vacilakikas, Armed Zaher, Nickolaos Zorbas, Constantinos Soursos, Ionnis Tsampasis, Nickolaos Costoglou, and Ioannis Sandalakis.

(3) Judgment is entered for the plaintiff, Stephen J. Morewitz, Administrator of the following Estates and

against the defendant, General Development & Shipping Enterprises Co., Ltd, in the amounts indicated, plus interest from date at 8% per annum, plus costs:

| | |
|---|---|
| Christos Passalis | $ 105,600.00; |
| Constantinos Stamatis | $ 126,692.80; |
| Gerassimos Markatos | $ 58,675.00; |
| George Marangos | $ 88,158.24; |
| Jesus Ramos Mayorquin | $ 34,864.60; |
| Efran Alvarado Martinez | $ 18,001.12; |
| Mukhtar Armed | $ 27,464.60. |

It is so ORDERED.

/s/ [Illegible]
United States District Judge

Norfolk, Virginia April 3, 1980.

**APPENDIX I**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

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Civil Action No. 76-103-NN, No. 77-63-NN,
No. 77-95-NN, No. 78-108-NN

---

STEPHEN J. MOREWITZ, ADMINISTRATOR, ETC., *et al.*,
*Plaintiffs*

v.

IMBROS SHIPPING CO., LTD., *et al.*,
*Defendants*

---

MEMORANDUM OPINION

These consolidated complaints in admiralty arising out of the unexplained loss at sea of the SS IMBROS with all hands, on December 18, 1975, in the Bermuda Triangle, were instituted in this Court in June, July, and August, 1977. They proceeded against Imbros Shipping Co., Ltd. and other defendants, including General Development & Shipping Enterprises Co., Ltd. (hereinafter GDSE or General Development). Imbros Shipping Co., Ltd. (hereinafter Imbros Shipping) was the owner of the ill-fated SS IMBROS. It was a one ship corporation.

Finding that the vessel SS IMBROS and its corporate owners, Imbros Shipping Co., Ltd., had insufficient contacts with the Eastern District of Virginia, this Court

held that there was no jurisdiction over the ship or shipowner. As to General Development, however, the evidence on discovery showed that it was acting as agent for twenty or more vessels, many of which called in the Hampton Roads port on a regular basis. The Court therefore found that process might properly issue against General Development in the Eastern District of Virginia. Whether the agency role of General Development as to Imbros Shipping Co., Ltd. could ever have been sufficiently developed to show GDSE as an entity liable to the decreased crew members of SS IMBROS was highly problematical. From the plaintiffs' standpoint, GDSE did pose an attractive target inasmuch as George Tsourinakis, a Greek shipowner, headquartered in Piraeus, was the sole owner of Imbros Shipping Co., Ltd. and was also the principal owner of GDSE.

As the case wound down through discovery against GDSE only, that defendant, which had theretofore actively responded to the orders of this Court, suddenly ceased to respond at all. Thereafter General Development failed to pursue any course to defend itself. Motions for the production of pay records and maintenance records of the SS IMBROS were totally ignored. Requests for production of records, which were supposedly in storage in Piraeus, went unanswered in spite of direct orders from this Court that such records be produced. Finally, with GDSE in apparent default, the Court ordered that any further failure of GDSE to respond to Court orders could result in the Court directing that GDSE be declared the owner *pro hac vice* for the purposes of this litigation and answerable on the issue of liability. GDSE ignored the directions and failed to respond. On July 27, 1979, we held, for reasons stated in an Opinion and Order filed that date, that GDSE, owner *pro hac vice*, was liable. The matter is now the Court for determination of damages.

---

The record discloses that as to three of the named plaintiffs in the suit, Augustus Edoro, able seaman, Afam Esuemi, able seaman, and Moses Egbonim, oiler, no evidence of support of or of the dependency of anyone as to any of the three crew members has been presented at all. The record therefore contains no proof as to any family dependency or any sums paid by any of these crew members for the support of anyone. Accordingly, the plaintiffs have not carried the burden of proof under any theory of damages and these claims are DISMISSED.

As to the claims of Sultan Akbar, able seaman, the evidence shows that by Order entered and releases exchanged in the Court of First Instance of Piraeus, on April 9, 1977, at which time the family of Akbar was represented by an attorney, this claim was settled and sums in excess of $9,660 in settlement were paid.

As to the claim of Markos Vasilakikas, captain of the IMBROS, the evidence shows that by Order entered and releases exchanged in the above Court on May 28, 1976, at which time the family was represented by an attorney, the claims were settled and sums in excess of $30,000 were paid.

As to the claim of Armed Zaher, mess boy, the evidence shows that by Order entered and releases exchanged in the same Court, this claim was settled on October 23, 1976, with the family of Zaher represented by an attorney. The claimants were paid $6,666.

As to the claim of Nickolaos Zorbos, second mate, the evidence shows that by Order entered and releases exchanged in the same Court on December 22, 1977, at which time the family was represented by an attorney, sums in excess of $20,000 were paid.

The claim of Constantinos Soursos, electrician, the evidence likewise shows was settled and releases exchanged in the same Court on December 3, 1976, with the family represented by an attorney. Sums in excess of $21,000 were paid.

As to the claim of Ionnis Tsampasis, second engineer, the evidence shows that the claim was settled and releases exchanged by Order of the same Court in 1976 and payment made in excess of $24,000. The family was represented by an attorney at the time of settlement.

As to the claim of Nickolaos Costoglou, able seaman, the evidence shows that the claim was settled and releases exchanged in the same Court by Order entered September 7, 1976 with payment to the claimants in excess of $11,000. Attorneys representing the family were present.

As to the claim of Ioannis Sandalakis, third engineer, from depositions tendered by his family, the evidence is that the claim was settled in the same Court in Piraeus and releases exchanged with payments to the claimants in excess of $15,000, and that they employed an attorney to represent them.

The evidence before the Court is, and we so find, that before settlements and compromises are ordered and affirmed by the Court of First Instance in Piraeus, they are considered fully by a qualified judge of that Court. The proceedings are formal. Detailed minutes are kept and recorded. In attendance are the attorneys for all sides, and most often, the claimants in persons. The Judge examines all documents and makes a thorough review of the facts. The voluntary nature of the settlements is of vital importance and is thoroughly considered by the judge personally.

We find the settlements to have been voluntary with attorneys representing all claimants and being present at all sessions. The effort to show overreaching falls far short of the mark. The close scrutiny of releases made by seamen does not apply to releases made by the families of the deceased seamen, supported as they were by attorneys representing them and in a competent Greek Court. *Morewitz, Adm., etc. v. EVGENIA G., etc., et al.*, —— F.2d —— (4th Cir., January 28, 1980).

After eliminating the eight claimants here who we find have voluntarily settled all their claims before the Court of First Instance in Piraeus, Greece and eliminating the claims of the three claimants who failed to produce any evidence, there are left remaining seven plaintiffs whose claims will be considered separately.

---

In each of the seven cases in which awards are made by the Court, the evidentiary effort to prove dependency or support is offered through a form of stereotype depositions, wherein the same written questions were propounded to selected relatives of deceased crew members. We have read all of the depositions and have given them such weight and credibility as we believe they warrant. As a general observation, the questions were broad and sometime misleading; the answers were couched in broad assertions, making claims for support payments which many times were not substantiated by any real evidence such as receipts, deposits, allotments, or otherwise; speculation was rampant; often the support claimed exceeded the income of the deceased seaman.

We have sorted through the evidence presented and base our award figures on what we consider to be the reliable scope of the proof offered. In all cases we have given the benefit of even a slight preponderance to the claimant, if his proof, in our judgment, justified reliance.

Wage claims based on earnings available and the draws against such earnings whether advances or for wages already earned prior to Mobile on December 11, 1975, are difficult to determine. Records are sparse, incomplete and for the most part, incoherent. For that good reason, attorney for the plaintiffs makes no real argument over wage transactions except at Mobile on December 11, 1975.

Our analysis of wage records (Exhibit 4) covering Mobile and for the subsequent short period until the sink-

ing of the IMBROS on December 18, 1975, indicates no advances beyond earnings, at least not proven by a preponderance of the evidence. Draws of larger remittances by crew members to be sent to their families in Greece, obviously in contemplation of the approaching Christmas Season, are not clearly in excess of wage balances then due such crew members or when actually paid in Piraeus later in December. On the one hand, the attorney for the claimants sought to boost the earnings of his clients crew members by insisting that great overtime and double time wages aboard IMBROS were substantial and usual and in the next breath, would cite only base pay to insist that draws made by the same crew mmebers were advances in excess of wages earned.

In the absence of a showing of a demand, there was no obligation to pay off this Greek crew, on a foreign ship, in Mobile, a port which was not the end of the voyage or the completion of their employment contract. *Fitzgerald v. Liberian S/T CHRYSSI P. GOULANDRIS,* 582 F.2d 312 (4th Cir. 1978).

Certainly wages earned and carried forward on the books before sailing from Mobile on December 12, 1975, and earned at sea in the last week before the sinking on December 18, 1975 would be proper claims, but in the absence of proof by a preponderance of the evidence as to the amount of such claims, we cannot speculate, and respectfully decline to do so.

Likewise, the claim of $20,000 each for conscious pain and suffering is not allowed. In the first place, the sum claimed was without any evidence to support it. A weak reference was offered that several days before the loss, a radiogram from IMBROS to its owners indicated trouble with a minor pump. It is argued that this message would indicate the vessel slowly sank and the claim for conscious pain and suffering is thus enhanced. We cannot give deference to any such argument. Subsequent

radio contact indicated the vessel was afloat and further along its base course two or three days later. The lack of proof to meet its burden defeats plaintiffs' claims. *New Orleans & Northeastern Railroad Co., et al. v. Harris*, 247 U.S. 367 (1918); *Gardner v. National Bulk Carriers, Inc.*, 221 F.Supp. 243 (E.D. Va. 1963), *aff'd*, 333 F.2d 676 (4th Cir. 1964); *Marine Sulphur Transport Corp. v. Marine Transport Lines, Inc.*, 1974 AMC 1504 (S.D. N.Y. 1974).

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*Christos Passalis*

Mr. Passalis was the Chief Engineer of the SS IMBROS and was lost at sea with that vessel on December 18, 1975. The claim before the Court is made by Stephen J. Morewitz, Administrator of the Estate of Christos Passalis, on behalf of Passalis' widow, Zorka Passalis, their child, Heleni, and Passalis' father and mother, Panagiotis and Eleni Passalis.

Christos Passalis was 34 at the time of his death in December, 1975, and would be 38 now. His widow, Zorka, is now 32 years old. His child, Heleni, was born in February, 1976, two months after her father's death. The father claimant is 64 and his mother claimant is 56.

From United States Health and Labor Department's official tables comes the following statistics applicable to his case

| | |
|---|---|
| *Passalis' life expectancy | 34 years |
| *Passalis' work expectancy | 25 years |
| Zorka Passalis' (widow) life expectancy | 46.1 years |
| Heleni Passalis' (child) life expectancy | 74.2 years |
| Panagiotis Passalis' (father) life expectancy | 17.7 years |
| Eleni Passalis' (mother) life expectancy | 26 years. |

---

* Here, and in the subsequent computations, the life expectancy and work expectancy is taken from 1979, since full allowances are made for years 1975-1979.

From appropriate mathematics tables the present value of annual future payments for each $1.00 payable each future year, applicable to this case, is:

24 years (work expectancy of Christos Passalis) = discount at 8% — 10.675 factor to be applied.

In this case, from the date of his marriage in July, 1975, to his death in December, 1975, the evidence shows Passalis gave his widow $2,000 plus two payments of $400 each, a total of $2,800 in five months. She claims a continuing contribution of $800 per month. Based on the evidence we find only $600 per month to be proved.

The father and mother of Passalis claim support from their son at the rate of $250 per month, but without evidence to support such claim. $100 per month is more likely under the circumstances of this case, particularly in light of the new responsibilities of the new husband and father.

There was not credible proof that any gifts were made at all, or if made, were only spontaneous and not of a continuing character. The claim for $2,000 per year for gifts is clearly without any substantive proof and is DISALLOWED.

*Passalis' Damages*

| Support payments proved | Term | Present Value |
|---|---|---|
| Widow and child $6,000 per year | 25 years (work expectancy of decedent)—8% discount factor of 10.675 | $ 64,050 |
| Mother and Father (Mother's life expectancy is in excess of deceased's work expectancy) | 25 years—8% discount factor of 10.529 | $ 12,810 |
| $6000 x 4 years (1975-present), widow and child | | $ 24,000 |
| $1200 x 4 years (1975-present), mother and father | | $ 4,800 |
| | | $105,600. |

*Constantinos Stamatis*

Mr. Stamatis was acting Chief Mate of the SS IMBROS and was lost at sea with that vesel on December 18, 1975. The claim before the Court is made by Stephen J. Morewitz, Administrator of the Estate of Constantinos Stamatis, on behalf of Stamatis' widow, Afrodite Stamatis, and Stamatis' mother, Athena Stamatis.

Constantinos Stamatis was 35 at the time of his death in December, 1975 and would be 39 now. His widow, Afrodite, is now 39. The mother claimant Athena is now 74.

From United States Health and Labor Department's official tables come the following statistics applicable to this case:

| | |
|---|---|
| Stamatis' life expectancy | 33.1 years |
| Stamatis' work expectancy | 24.1 years |
| Afrodite Stamatis' (widow) life expectancy | 39.4 years |
| Athena Stamatis' (mother) life expectancy | 11 years. |

From appropriate mathematics tables the present value of annual future payments for each $1.00 payable each future year, applicable here are:

| | |
|---|---|
| 24 years (work expectancy of Constantinos Stamatis) = discount at 8% | — 10.529 factor to be applied. |
| 11 years (life expectancy of Athena Stamatis) = discounts at 8% | — 7.1390 factor to be applied. |

In this case, the evidence can only sustain monthly payments at the rate of $650 to the widow, Afroditi, as opposed to $800 per month claimed by her. Support to the mother, Athena, is presented in the form of written substantiation of about $1000 in 11 months. We conclude $100 per month to the mother is the limit of the evidence.

Again, there is no credible proof of a continuing gift routine and such claims, if any, are DISALLOWED.

---

*Stamatis' Damages*

| Support payments proved | Term | Value Present |
|---|---|---|
| Widow, Afrodite, $7800 per year | 24 years (work expectancy of decedent)—8% discount factor of 10.529 | $ 82,126.20 |
| Mother, Athena, $1200 per year | 11 years (life expectancy)—8% discount factor of 7.1390 | $ 8,566.60 |
| $7800 x 4 years (1975-present), widow | | $ 31,200.00 |
| $1200 x 4 years (1975-present), mother | | $ 4,800.00 |
| | | $126.692.80. |

---

*Gerassimos Markatos*

Mr. Markatos was the Boatswain of the SS IMBROS and was lost at sea with that vessel on December 18, 1975. The claim before the Court is brought by Stephen J. Morewitz, Administrator of the Estate of Gerassimos Markatos, on behalf of Andreas Markatos, father, and Anastasia, mother.

Gerassimos Markatos was 40 at the time of his death in December, 1975 and would be 44 now. His father, Andreas, is now 78 and his mother, Anastasia, is now 68.

From United States Health and Labor Department's official tables, the following statistics are applicable to this case:

| | |
|---|---|
| Markatos' life expectancy | 28.6 years |
| Markatos' work expectancy | 19.8 years |
| Andreas Markatos' (father) life expectancy | 6.9 years |
| Anastasia Markatos' (mother) life expectancy | 15.1 years. |

From appropriate mathematics tables the present value of annual future payments for each $1.00 payable each future year, applicable here, are:

| | | |
|---|---|---|
| 15 years (life expectancy of Anastasia Markatos) | = discount at 8% | 8.5995 factor to be applied. |

In this case the evidence sustains support by Markatos, who was unmarried, of his mother and father at the rate of $400 per month.

There is no credible evidence upon which to base any award on the grounds of continuing gifts.

**Markatos' Damages**

| Support payments proved | Term | Present Value |
|---|---|---|
| Mother and Father, $4800 per year | 15 years (life expectancy of mother) | $41,075 |
| $48000 x 4 years (1975-present), parents | | $17,600 |
| | | $58,675 |

---

*George Marangos*

Mr. Marangos was the Cook aboard the SS IMBROS and was lost at sea with that vessel on December 18, 1975. The claim before the Court is made by Stephen J. Morewitz, Administrator of the Estate of George Marangos, on behalf of Marangos' widow, Anna Marangos, and three children of Marangos, Andreas, Ekaterini and Georgia.

George Marangos was 47 at the time of his death in December, 1975 and would be 51 now. His widow, Anna, is now 39. The present ages of his three children are, Andrea, 16, Ekaterini, 5 and Georgia 4.

From United States Health and Labor Department's official tables come the following pertinent statistics applicable to this case:

| | |
|---|---|
| Marangos' life expectancy | 22.8 years |
| Marangos' work expectancy | 14.1 years |
| Anna Marangos' (widow) life expectancy | 39.4 years |
| Andreas Marangos' (daughter) life expectancy | 61.5 years |
| Ekaterini Marangos' (daughter) life expectancy | 72.3 years |
| Georgia Marangos' (daughter) life expectancy | 73.3 years. |

From the appropriate mathematics tables the present value of annual future payments for each $1.00 payable each future year is:

| | |
|---|---|
| 14 years (work expectancy of George Marangos) = discount of 8% | 8.2442 factor to be applied. |

In this case we find the credible evidence to be that Marangos was contributing $600 per month to his wife and family.

Again, there is no credible evidence upon which to base any award on the grounds of sustaining gifts.

Marangos' Damages

| Support payments proved | Term | Present Value |
|---|---|---|
| Widow and family $7200 per year | 14 years (work expectancy of decedent) | $59,358.24 |
| $7200 x 4 years (1975-present), widow and children | | $28,800.00 |
| | | $88,158.24. |

---

*Jesus Ramos Mayorquin*

Mr. Mayorquin was an able seaman aboard the SS IMBROS and was lost at sea with that vessel on December 18, 1975. The claim before the Court is made by Stephen J. Morewitz, Administrator of the Estate of Jesus Ramos Mayorquin, on behalf of his father, Felix, mother, Guillermina, sister, Maria, brother Daniel, and brother, Jose.

Jesus Mayorquin was 34 at the time of his death in December, 1975 and would be 38 now. His father, Felix, is now 72; his mother, Guillermina, is now 58; sister, Maria is now 14; brother, Daniel is now 17; and brother, Jose, is now 18.

From United States Health and Labor Department's official tables come the following pertinent statistics applicable to this case:

| | |
|---|---|
| Mayorquin's life expectancy | 34 years |
| Mayorquin's work expectancy | 25 years |
| Felix Mayorquin's (father) life expectancy | 10 years |
| Guillermina Mayorquin's (mother) life expectancy | 23.4 years. |

From the appropriate mathematics tables the present value of annual future payments for each $1.00 payable each future year are:

| | |
|---|---|
| 24 years (life expectancy of Guillermina Mayorquin, mother) = discount at 8 % | 10.529 factor to be applied. |

In this case we find the credible evidence to be that Mayorquin was contributing $200 per month for the support of his father, mother, sister and brothers.

Again, there is no credible evidence upon which to base any award on the grounds of sustaining gifts.

Mayorquin's Damages

| Support payments proved | Term | Present Value |
|---|---|---|
| Family—$2400 per year | 24 years (life expectancy of mother) | $25,264.60 |
| $2400 x 4 years (1975-present), family | | $ 9,600.00 |
| | | $34,864.60 |

*Efran Alvarado Martinez*

Mr. Martinez was a deckboy aboard the SS IMBROS and was lost at sea with that vessel on December 18, 1975. The claim before the Court is brought by Stephen J. Morewitz, Administrator of the Estate of Efran Alvarado Martinez, in behalf of his father, Efrain, mother, Priscilla; sister, Denora; brother, Jose; brother, Danelo.

Efran Martinez, unmarried, was 24 at the time of his death in December, 1975 and would be 28 now. His father, Efrain, is now 53; his mother, Priscilla, is now 51; his sister, Denora is now 12; his brother, Jose, is now 19; and his brother Danelo is now 21.

From the United States Health and Labor Department's official tables come the following pertinent statistics applicable to the case:

| | |
|---|---|
| Martinez' life expectancy | 43.3 years |
| Martinez' work expectancy | 34.2 years |
| Efrain Martinez' (father) life expectancy | 21.2 years |
| Priscilla Martinez' (mother) life expectancy | 28.6 years. |

From the appropriate mathematics tables the present value of annual future payments for each $1.00 payable each future year is:

| | |
|---|---|
| 28 years (life expectancy of Priscilla Martinez, mother) + discount at 8% | 11.051 factor to be applied. |

In this case the credible evidence is that Martinez was contributing $100 per month to his mother and father.

Again, there is no evidence upon which to base any award on the grounds of sustaining gifts.

Martinez' Damages

| Support payments proved | Term | Present Value |
|---|---|---|
| Mother and Father $1200 per year | 28 years (life expectancy of mother) | $13,201.12 |
| $1200 x 4 years (1975-present), parents | | $ 4,800.00 |
| | | $18,001.12. |

*Mukhtar Armed*

Mr. Armed was the Assistant Cook aboard the SS IMBROS and was lost at sea with the vessel on December 18, 1975. The claim before the Court is made by Stephen J. Morewitz, Administrator of the Estate of Mukhtar Armed on behalf of his father, Gulzar; his mother; Khatoon; his brother, Zulfegar; his brother, Iftikhar; and his brother, Ijoz.

Mukhtar Armed was 21 at the time of his death in December, 1975 and would now be 25. His father, Gulzar, was 56; his mother, Khatoon was 45; his brother, Zulfegar was 16; his brother, Iftikhar was 11; and his brother, Ijoz was 19.

From the United States Health and Labor Department's official tables come the following perintent statistics applicable to this case:

| | |
|---|---|
| **Armed's life expectancy** | **46 years** |
| **Armed's work expectancy** | **37 years** |
| **Gulzar Armed's (father) life expectancy** | **17.7 years** |
| **Khatoon Armed's (mother) life expectancy** | **30.3 years.** |

From appropriate mathematics tables the present value of annual future payments for each $1.00 payable each future year, applicable here, are:

| | |
|---|---|
| **30 years (work expectancy of Armed; life expectancy of Khatoon Armed, mother) = discount at 8%** | **11.258 factor to be applied.** |

In this case the credible evidence is that Armed contributed $150 per month for the support of his mother, father, and brothers.

There is no credible evidence upon which to base any award on the grounds of prospective continuing gifts.

**Armed's Damages**

| Support payments proved | Term | Present Value |
|---|---|---|
| Mother, Father and Brothers $1800 per years | 30 years (work expectancy of Armed; life expectancy of Khatoon Armed, mother) | $20,264.40 |
| $1800 x 4 years (1975-present), family | | $ 7,200.00 |
| | | $27,464.40. |

---

*Summary*

(1) The claim of Stephen J. Morewitz, Administrator of the Estates of Augustus Edoro, Afam Eseumi and Moses Egbonim, are DISMISSED, for failure to present any evidence and thus to meet the burden of proof.

(2) The claim of Stephen J. Morewitz, Administrator of the Estates of Sultan Akbar, Markos Vasilakikas, Armed Zaher, Nickolaos Zorbas, Constantinos Soursos, Ionnis Tsampsis, Nickolaos Costoglou, and Ioannis Sandalakis are DISMISSED, as having been settled and released in appropriate actions brought in the Court of First Instance in Piraeus, Greece.

Judgments will be forthwith entered in favor of Stephen J. Morewitz, Administrator in each of the following Estates, as indicated:

| | |
|---|---|
| Christos Passalis | $105,600.00; |
| Constantinos Stamatis | $126,692.80; |
| Gerassimos Markatos | $ 58,675.00; |
| George Marangos | $ 88,158.24; |
| Jesus Ramos Mayorquin | $ 34,864.60; |
| Efran Alvarado Martinez | $ 18,001.12; |
| Mukhtar Armed | $ 27,464.40, |

plus interest at 8% per annum from this date, plus costs.

It is so ORDERED.

/s/ [Illegible]
United States District Judge

Norfolk, Virginia April 3, 1980.

**APPENDIX J**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

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Civil Action No. 76-103-NN

RUTH A. MOREWITZ, ADMINISTRATRIX, ETC., *et al.*,
*Plaintiffs*

v.

IMBROS SHIPPING CO., LTD., *et al.*,
*Defendants*

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ORDER

This matter has been pending on this Court's docket since July, 1976. It grows out of the unexplained sinking of the SS IMBROS, with loss of all hands somewhere off Bermuda in December, 1975. The several plaintiffs are the personal representatives of lost crewmen. The vessel owner of record, Imbros Shipping Co., Ltd., was dismissed earlier for lack of jurisdiction. Remaining as defendants, under a variety of claims, many of which have been conjured up by the facile mind of the plaintiffs' attorney, are Contramar, S.A., Continental Lines (Armement), S.A., Neptune International Shipping, Ltd., United States of America, and General Development & Shipping Enterprises Co., Ltd.

This Order deals only with General Development & Shipping Enterprises Co., Ltd. [hereinafter "General Development"].

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The file will reveal extensive discovery aimed by plaintiffs to establish jurisdiction in this federal district. In an Order dated August 28, 1978, the Court found that General Development, an agent of SS IMBROS, had transacted sufficient business in Hampton Roads in Eastern Virginia to satisfy process and to warrant its being sued here. Plaintiffs' claims against General Development, stated broadly, deal with the condition, stability, and manning of the IMBROS, and the element of control of the vessel by General Development, if of such totality as to saddle that defendant with a prospect of liability.

Discovery to General Development to produce ship's reports, logs, inspections, drydockings, maintenance, and information as its providing crews for the vessel, has been unavailing, although a year ago, the owner of General Development indicated such papers were in storage. Now, in spite of many and repeated Court orders directly ordering the production of documents and General Development's personnel to testify on discovery, no response can be obtained from General Development owners in Greece. It is suggested that General Development is out of business.

Finally, by an ultimatum direction issued on February 1, 1979, a final thirty day period to respond was given with no response. Trial is set for May 22, 1979.

---

Under authority of Rule 37(d) of the Federal Rules of Civil Procedure, because of defendant's, General Development's, failure to respond to the discovery orders of this Court, it is ORDERED:

(1) For the purpose of the trial in this matter General Development & Shipping Enterprise Co., Ltd. shall be considered as owner *pro hac vice* at the time of the loss.

(2) General Development & Shipping Enterprises Co., Ltd., at trial, is precluded from introducing any evidence

pertaining to the documents requested from General Development by the other parties dealing with the condition of the SS IMBROS, its stability, maintenance of its machinery and equipment.

(3) The failure of General Development & Shipping Enterprises Co., Ltd. to respond to discovery requested since November, 1978 carried with it the adverse inference that the information and documents sought would have been unfavorable to General Development.

These sanctions are not to be construed as concomitant to a pronouncement of liability. The requirements of proof at trial, that even an owner *pro hac vice* is liable will prevail.

/s/ [Illegible]

Norfolk, Virginia March 26, 1979.

## APPENDIX K

[Filed Jan. 30, 1979]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

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Civil Action No. 76-103-NN

RUTH A. MOREWITZ, Administratrix of the Estate of CONSTANTINOS STAMATIS, ETC.,
*Plaintiff,*

-versus-

IMBROS SHIPPING CO., LTD., *et als,*
*Defendants.*

---

Civil Action No. 77-63-NN

RUTH A. MOREWITZ, Administratrix of the Estate of JESUS RAMOS MAYORQUIN, deceased,
*Plaintiff,*

-versus-

IMBROS SHIPPING CO., LTD., *et als,*
*Defendants*

---

Civil Action No. 77-95-NN

RUTH A. MOREWITZ, Administratrix of the Estate of EFRAIN ALVARADO MARTINEZ, deceased,
*Plaintiff,*

-versus-

IMBROS SHIPPING CO., LTD., *et als,*
*Defendants.*

---

## ORDER

It appearing to the Court that Ruth A. Morewitz died on December 6, 1978, at Charlottesville, Virginia, and that Stephen J. Morewitz has been appointed by the Clerk of the Circuit Court of the City of Newport News, Virginia, as Administrator de bonis non of the Estates of Christos Passalis, George Marangos, Constantinos Stamatis, Gerassimos Markatos, Jesus Ramos Mayorquin, Efrain Alvarado Martinez, Moses Egbonim, Augustus Edoro, Khalid Sultan, Mukhtar Ahmed and Afam Esumei, and has duly qualified and given bonds,

It is hereby ORDERED, ADJUDGED and DECREED that Stephen J. Morewitz, Administrator, d.b.n of the Estates of Christos Passalis, George Marangos, Constantinos Stamatis, Gerassimos Markatos, Jesus Ramos Mayorquin, Efrain Alvardo Martinez, Moses Egbonim, Augustus Edoro, Khalid Sultan, Mukhtar Ahmed and Afam Esumei, be and he hereby is, substituted as Plaintiff and Intervening Plaintiff in the above styled actions.

/s/ [Illegible]
United States District Judge

Norfolk, Virginia January 29, 1979

I ask for this:

/s/ [Illegible]
BURT M. MOREWITZ
Of Attorneys for Plaintiffs &
Intervening Plaintiffs

Seen:

/s/ [Illegible]
SEAWELL, MCCOY, DALTON, HUGHES,
GORE & TIMMS
Attorneys for Defendant
General Development & Shipping
Enterprises Co., Ltd.

/s/ [Illegible]
VANDEVENTER, BLACK, MEREDITH
& MARTIN
Attorneys for Defendants
Continental Lines, S.A. and
Contramar, S.A.

/s/ [Illegible]
JETT, BERKLEY, FURR & PRICE
Attorneys for Defendant
Neptune International Shipping, Ltd.

/s/ Stephen E. Leach
STEPHEN E. LEACH
Of Attorneys for Defendant
United States of America

## APPENDIX L

## TITLE 9

## ARBITRATION

Sec.

1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.

2. Validity, irrevocability, and enforcement of agreements to arbitrate.

3. Stay of proceedings where issue therein referable to arbitration.

4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

5. Appointment of arbitrators or umpire.

6. Application heard as motion.

7. Witnesses before arbitrators; fees; compelling attendance.

8. Proceedings begun by libel in admiralty and seizure of vessel or property.

9. Award of arbitrators; confirmation; jurisdiction; procedure.

10. Same; vacation; grounds; rehearing.

11. Same; modification or correction; grounds; order.

12. Notice of motions to vacate or modify; service; stay of proceedings.

13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement.

14. Contracts not affected.

### § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

July 30, 1947, c. 392, 61 Stat. at 670.

### § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 Stat. 670.

### § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to

arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 392, 61 Stat. 670.

### § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the

trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.

**§ 16. Appeals**

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(Added Pub.L. 100-702, Title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4671, § 15, renumbered Pub.L. 101-650, Title III, § 325(a)(1), Dec. 1, 1990, Stat. 5120.)

# APPENDIX M

## CHAPTER 23

## CASUALTY INSURANCE CONTRACTS

### ARTICLE 1.

### GENERAL PROVISIONS.

**§ 27-23-1. When insurer's liability absolute.**

As to every contract of insurance made between an insurer and any insured by which such insured is insured against loss or damage on account of the bodily injury or death by accident of any person for which loss or damage such insured is responsible, whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurer shall become absolute and the payment of the loss shall not depend upon the satisfaction by the insured of a final judgment against him for loss, or damage or death occasioned by the casualty. No such contract of insurance shall be cancelled or annulled by any agreement between the insurer and the insured after the insured has become responsible for such loss or damage, and any such cancellation or annulment shall be void. (Code 1940, T. 28, § 11; Acts 1971, No. 407, p. 707, § 484.)

**§ 27-23-2. Rights of judgment creditors.**

Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury, or death or for loss or damage to property, if the defendant in such action was insured against the loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money provided for in the contract of insurance between the insurer and the defendant applied to the

satisfaction of the judgment, and if the judgment is not satisfied within 30 days after the date when it is entered, the judgment creditor may proceed against the defendant and the insurer to reach and apply the insurance money to the satisfaction of the judgment. (Acts 1953, No. 283, p. 350; Acts 1971, No. 407, p. 707, § 485.)

## APPENDIX N

# THE THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT 1930

(20 & 21 Geo. 5 c. 25)

*An Act to confer on third parties rights against insurers of third-party risks in the event of the insured becoming insolvent, and in certain other events*

[10th July 1930]

Before the passing of this Act a creditor had no right to the proceeds, as such, of any third party insurance effected by a person insolvent (or a company in liquidation) when the insurance moneys became payable to meet his claim. This Act is designed to remedy the injustice of that position (as respects injured third parties) to which Atkin L.J. referred in *Re Harrington Motor Co., Ltd., Ex parte Chaplin,* [1928] Ch. 105, at pp. 116, 117; followed in *Hood's Trustees* v. *Southern Union General Insurance Co. of Australasia, Ltd.,* [1928] Ch. 793, C.A.

Cf.. the agreement dated 17th June 1946 between the Minister of Transport and the Motor Insurers' Bureau (see Bingham's Motor Claims Cases (5th Edn.) 658) providing that a third party injured by a motorist without an effective policy of insurance shall receive damages to the same extent as if the motorist had an effective policy.

1. Rights of third parties against insurers on bankruptcy, etc., of the insured

(1) Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then—

(*a*) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or

(*b*) in the case of the insured being a company, in the event of a windingup order being made, or

a resolution for a voluntary winding-up being passed, with respect to the company; or of a receiver or manager of the company's business or undertaking being duly appointed, or of possession being taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge;

if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred.

(2) Where an order is made under section one hundred and thirty of the Bankruptcy Act, 1914, for the administration of the estate of a deceased debtor according to the law of bankruptcy, then, if any debt provable in bankruptcy is owing by the deceased in respect of a liability against which he was insured under a contract of insurance as being a liability to a third party, the deceased debtor's rights against the insurer under the contract in respect of that liability shall, notwithstanding anything in the said Act, be transferred to and vest in the person to whom the debt is owing.

(3) In so far as any contract of insurance made after the commencement of this Act in respect of any liability of the insured to third parties purports, whether directly or indirectly, to avoid the contract or to alter the rights of the parties thereunder upon the happening to the insured of any of the events specified in paragraph (*a*) or paragraph (*b*) of subsection (1) of this section or upon the making of an order under section one hundred and thirty of the Bankruptcy Act, 1914, in respect of his estate, the contract shall be of no effect.

(4) Upon a transfer under subsection (1) or subsection (2) of this section, the insurer shall, subject to the provisions of section three of this Act, be under the same liability to the third party as he would have been under to the insured, but—

(*a*) if the liability of the insurer to the insured exceeds the liability of the insured to the third party; nothing in this Act shall affect the rights of the insured against the insurer in respect of the excess; and

(*b*) if the liability of the insurer to the insured is less than the liability of the insured to the third party, nothing in this Act shall affect the rights of the third party against the insured in respect of the balance.

(5) For the purposes of this Act, the expression "liabilities to third parties", in relation to a person insured under any contract of insurance, shall not include any liability of that person in the capacity of insurer under some other contract of insurance.

## APPENDIX O

**Extracts of the Rules of The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg)**

# THE RULES

# OF

# THE WEST OF ENGLAND SHIP OWNERS

# MUTUAL PROTECTION

# AND

# INDEMNITY ASSOCIATION

# (LUXEMBOURG)

*as of 20th February 1975*

* * * *

Insurance afforded by Association based on Rules

3.—Subject to the powers of the Association (as set out in the Constitution) to accept entries on special terms the insurance afforded by the Association shall be in accordance with and upon the terms of these Rules.

Members and Successors bound by Rules

4.—(a) Subject to any special terms which may have been agreed in writing between the Member and the Association these Rules for the time being in force shall bind a person on becoming a Member of the Association to the same extent as if they had been signed by the Member and contained an undertaking on his part to observe all and each of the provisions thereof.

(b) All contracts of insurance entered into between the Association and any Owner shall, save in so far as

they contain any special terms inconsistent herewith, be deemed to incorporate and shall incorporate all the provisions of these Rules.

(c) An insured Owner who has entered a vessel for insurance in the Association shall be deemed to have agreed not only on his own behalf but also on behalf of his successors and each of them that both he and they will in every respect be subject to and bound by the provisions of these Rules and by any contract of insurance with the Association.

* * * *

## PART IV—TERMS AND CONDITIONS OF INSURANCE

Payment first by Insured Owner

18.—Unless the Association in its absolute discretion shall otherwise determine it shall be a condition precedent of an insured Owner's right to recover from the funds of the Association in respect of any liabilities, costs of expenses that he shall first have discharged or paid the same.

* * * *

Rules subject to English law

62.—These Rules and all contracts between an insured Owner and the Association relating to the insurance afforded by the Association or otherwise shall be governed by English law.

* * * *

Arbitration

64.—If any difference or dispute shall arise between an insured Owner (including an Owner who has ceased to be insured by the Association) and the Association out of or in connection with these Rules or arising out of any contract between an insured Owner and the Association or as to the rights or obligations of the Association or the insured Owner thereunder or in connection therewith

or as to any other matter whatsoever, such difference or dispute shall be referred to the arbitration in London of a sole legal Arbitrator. Such Arbitrator shall be a practising Queen's Counsel of the Commercial Bar and if unavailable any other practising Queen's Counsel and the submission to arbitration and all the proceedings therein shall be subject to the provisions of the Arbitration Act 1950 and any Statutory modification or re-enactment thereof. In any such Arbitration any matter decided or stated in any Judgment or Arbitration Award (or in any Reasons given by an Arbitrator or Umpire for making any Award) relating to proceedings between the insured Owner and any third party, shall be admissible in evidence. The obtaining of an Arbitration Award as hereinbefore provided shall be a condition precedent to the right of any insured Owner to bring or maintain any action, suit or other legal proceedings against the Association in respect of any such difference or dispute.

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